Supreme Court, U.S.
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No. 80-307

In the Supreme Court of the United States

OCTOBER 1980 TERM

STEPHENS INSTITUTE, a corporation, d/b/a ACADEMY OF ART COLLEGE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CALIFORNIA FEDERATION OF ART TEACHERS,
Intervenors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the National Labor Relations Board acted arbitrarily and in excess of its jurisdiction in unilaterally setting aside the portion of a settlement agreement dismissing previous charges against Stephens Institute (Academy of Art College), but nevertheless holding the Academy to a compromise stipulation abandoning the Academy's objection to jurisdiction which was part of the same settlement.

2. Whether or not the Court of Appeals' decision conflicts with that of the Supreme Court in *NLRB v. Yeshiva University,* ..... U.S. ....., 100 S.Ct. 856 (1980) in holding without adequate factual determination that the Academy's department heads and art instructors are not managerial employees exempted from coverage of the National Labor Relations Act under the doctrine of *NLRB v. Yeshiva University.*

B. LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals for the Ninth Circuit.

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D. REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears in 620 F.2d 720 (9th Cir. 1980). The National Labor Relations Board decisions in the two consolidated cases are reported in 241 NLRB No. 71, 1978-79 CCH NLRB Decisions ¶ 15,687 (1979), and 241 NLRB No. 133, 1978-79 CCH Decisions ¶ 15,759 (1979).

E. GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(i) The judgment sought to be reviewed is dated May 27, 1980, and was entered July 3, 1980.

(ii) Petition for rehearing was filed May 14, 1980. Rehearing was denied June 25, 1980.

(iii) This Court has jurisdiction to review the judgment by writ of certiorari under authority of 29 USC 3160(e) and 28 USC 1204.

F. STATUTES AND REGULATIONS INVOLVED IN THE PETITION FOR CERTIORARI

NLRB Jurisdictional Standard for colleges

29 Code of Federal Regulations, Section 103.1

"Colleges and Universities.—The Board will assert its jurisdiction in any proceeding arising under section 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than $1 million. (As added December 3, 1970, 35 F. R. 18371.)"

NLRB Field Manual Sections concerning settlements

Section 10146, 10146.1

"10146 *Nature of informal settlements*

10146.1 *In general:* An informal settlement agreement is a simple written agreement, providing that

the charged party will take certain action in remedy of his unfair labor practices. It requires the approval of the Regional Director but does not provide for a Board Order or court decrees."

Section 10150, 10150.1

"10150 *Effectuation, performance, and closing of all-party settlement case*

10150.1 *Action upon approval of agreement:* Upon approval by the Regional Director of a settlement agreement in which the charging party joins, the parties through their attorneys or representatives should be informed of the fact and the charged party through his attorney or representative should be requested immediately to take the action called for in the agreement. He should be furnished with sufficient copies of the notice and be given whatever other assistance the Region can render toward carrying out the agreement."

Section 10152, 10152.1b

"10152 *Effectuation, performance, and closing of "Unilateral" settlement case*

10152.1b *Dismissal of charge:* Upon approval of an informal settlement agreement, the Regional Director should dismiss the charge in accordance with the terms of the agreement."

Section 10154

"10154 *Noncompliance:* In the event that, in the opinion of the Regional Director, the provisions of the agreement have not or will not be carried out, he will notify the parties of this fact and inform them that, despite the execution of the agreement, such action as appears necessary to effectuate the purposes of the Act will be taken. Thereafter, appropriate action, as if there had been no settlement agreement, will be

taken; complaint will be issued, or reissued, and pressed on its merits and not on the basis of noncompliance with the agreement."

Statutory provision concerning urging of objections not made before the Board

29 USC 160(e)

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for

the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final except that the same shall be subject to review by the appropriate United States Court of Appeals if application was made to district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

G. STATEMENT OF THE CASE

1. One-Sided Rescission of a Portion of a Settlement Agreement and Enforcement of the Balance by the NLRB.

In April 1977, the National Labor Relations Board filed a complaint against Stephens Institute, doing business as the Academy of Art College.[1] The complaint alleged discriminatory discharges and other violations of the Act. The Academy in its answer denied the charges and, moreover, denied that it had received the requisite gross revenues of $1,000,000 per year to become subject to the Board's standard for exercising jurisdiction over colleges (set forth in Title 29 Code of Federal Regulations, Section 103.1 as to

1. Throughout the petition, we will refer to the petitioner by its common name, the Academy of Art College.

non-profit colleges and made applicable to colleges for profit such as the Academy of Art by NLRB decision).

At the commencement of the hearing before the Administrative Law Judge in August 1977, counsel for the General Counsel introduced into evidence two complementary settlement agreements, in which it was contemplated that the General Counsel would withdraw certain of the charges of discriminatory discharge and that others would remain to be tried. An exhibit to one of the settlement agreements was a stipulation between the parties that the Academy had grossed $1,000,000, which would satisfy the NLRB's jurisdictional standard. Counsel for the General Counsel then immediately withdrew certain of the discriminatory dis charge counts as contemplated in the settlement.

After conclusion of the hearing on the other charges, but before decision by the Administrative Law Judge, the Regional Director withdrew her approval of the settlement agreement on the ground that the Academy had not complied with its terms.

The case was reopened and the dismissed counts were reinstated over objection of the Academy. The case then proceeded to conclusion without proof of jurisdiction other than the stipulation which was an exhibit to the settlement agreement. In its brief to the Administrative Law Judge after the evidence had been submitted, the Academy argued that if he should sustain the Regional Director's action in setting aside the settlement agreement, there would exist a fatal defect of proof of jurisdiction. The Academy again argued to the Board and the Court of Appeals that there was no proof of jurisdiction in the record.

Nevertheless, the Administrative Law Judge, the Board and the Court of Appeals all upheld the power of the NLRB to thus arbitrarily set aside the withdrawal of charges contemplated in the settlement agreement while yet retaining

the benefits. They have all found jurisdiction in the first consolidated case on the basis of the Academy's stipulation which was part of the settlement.

2. Managerial Status of Department Heads and Instructors

Pending decision after argument of these consolidated cases before the Court of Appeals, this Court announced its decision in *NLRB v. Yeshiva University*, ... U.S. ...., 100 S.Ct. 856 (1980). *Yeshiva* expanded to a college faculty the concept of managerial employees who have been judicially exempted from the National Labor Relations Act. The managerial issue had not been raised at the hearings of these two consolidated cases and neither the Administrative Law Judges nor the NLRB made any factual findings as to the managerial status of the Academy's department heads and instructors who were found to have been discriminatorily discharged. Findings of the Administrative Law Judges, however, include strong indications that the Academy's department heads and instructors are managerial employees. The department heads transmitted instructions from the administration to rank and file instructors. The Faculty Senate, elected in part by and from the ranks of instructors, met and deliberated on such managerial subjects as class size, curriculum, status of faculty members, student counseling, professional responsibilities of teachers, leaves of absence and terminations. The Senate was entrusted with the sole power to discharge faculty members.

H. FEDERAL JURISDICTION IN THE COURT OF APPEALS

Federal jurisdiction in the Court of Appeals existed to hear the case by virtue of 29 U.S.C. Section 160(f). Petitioner contends that by reason of the arguments set forth

herein, neither the National Labor Relations Board nor the Court of Appeals had jurisdiction to find petitioner guilty of an unfair labor practice on the record before those tribunals.

I. ARGUMENT

1. The Court of Appeals' Decision Has Sanctioned the NLRB's Flagrant Departure from Acceptable Adjudicatory Standards Established by This Court In Upholding the NLRB's One-Sided Rescission of the Portion of a Settlement Agreement by Which the Employer Benefitted (Withdrawal of Charges) While Nevertheless Holding the Employer to the Stipulation to Jurisdiction In the Settlement Agreement by Which the Government Benefitted.

The only proof of jurisdiction in the record is contained in a stipulation to jurisdiction by the Academy made solely for the purpose of compromise, which was included as part of a settlement agreement (supra, p. 6). Yet the NLRB had set aside the settlement agreement and reinstated and tried and convicted the Academy of the charges in the complaint which the Board had previously withdrawn pursuant to the settlement (supra, p. 6). Over the Academy's objection, the Board ruled that it had the power to hold the Academy to its settlement stipulation while, nevertheless, rescinding the withdrawal of charges. We assert that the reason the General Counsel did not, in the face of the Academy's objection, move to prove that the Academy had received $1,000,000 gross income is because the facts are to the contrary in the first consolidated proceeding.[1] The Court of Appeals has enforced the Board's order.

This action by the Board violates a broad principle of fair dealing which the Courts have applied in a variety of

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1. While gross receipts in excess of $1,000,000 were proved in the second proceeding, that involved a later period of time, and we are confident that this jurisdictional standard cannot be proved as to the first proceeding.

situations. In *Stoffela v. Nugent,* 217 U.S. 499, 30 S.Ct. 600 (1910) this Court, speaking through Mr. Justice Holmes, held that a decision allowing a similar one-sided rescission did not result in "substantial justice" (30 S.Ct. at 601). In *Stoffela,* defendant had acted fraudulently in obtaining a deed and mortgage. However, in performance of the voidable agreement, defendant had satisfied certain judgment liens. Plaintiff then obtained judgment setting aside a deed to defendant without being required to reimburse defendant for the sums it had advanced to benefit the property. The Supreme Court reversed on the ground that when one has a right to rescind a transaction, the Courts will endeavor to do substantial justice to the other party even though the other party may have been guilty of improper conduct. The Court states (30 S.Ct. at 601).

> "It is true that the defendant acted fraudulently and knew what he was about. But a man, by committing a fraud, does not become an outlaw and caput lupinum. National Bank & L. Co. v. Petrie, 189 U.S. 423, 425, 47 L. ed. 879, 880, 23 Sup. Ct. Rep. 512. He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so, the courts will endeavor to do substantial justice, so far as is consistent with adherence to law."

Previously, the Court of Appeals for the Ninth Circuit has applied this fundamental principle in varied contexts. In *A&A Sign Company v. Maughan,* 419 F.2d 1152 (9th Cir. 1969) a compromise agreement had been entered into between a trustee in bankruptcy and a creditor. Purporting to act under its broad discretion to grant or deny approval to such an agreement, the Bankruptcy Court had attempted, over the objection of the creditor, to remove a material

part of the stipulation and yet enforce the rest of the agreement. This the Court held may not in good conscience be done, stating (419 F.2d at 1155):

> "The bankruptcy court in exercise of its equitable powers can set aside a stipulation entirely if the interests of justice so require and if the parties can be restored to the positions they occupied before they entered the stipulation. [Citations omitted.] But it cannot remove a material part of the stipulation over the objection of one of the parties to it and enforce the rest of the agreement. (Emerick & Duncan Co. v. Hascy (9th Cir. 1906) 146 F. 688; see United States v. Southern Constructors, Inc., supra.)"

In *Emerick & Duncan Co. v. Hascy,* 146 Fed. 688 (9th Cir. 1906), on which the court relied in *A&A Sign Company* (419 F.2d at 1155) this fundamental principle of justice had been recognized in a different context. *Emerick & Duncan* was an unfair competition case in which defendant had adopted a trade name similar to that of plaintiff in order to mislead customers and capture some of the plaintiff's goodwill. Prior to trial, defendant had stipulated to confess judgment, change its name and take other remedial action in consideration of plaintiff's agreement not to levy execution. The trial court enforced defendant's obligations under the agreement, but because of misrepresentations of defendant, relieved plaintiff of its agreement not to levy execution and awarded damages to plaintiff. The Court of Appeals reversed, stating (146 Fed. at 695):

> "It is a fundamental principle of equity that one party to an agreement, by whatever name called, whether contract, stipulation, or anything else, cannot be relieved of its burdens while holding on to its benefits. That is exactly what the appellees sought to do, and what they were permitted to do by the court below. They did not offer to put the appellant in statu quo, even to the extent that it was possible to do so; they

did not offer to permit the appellant's default to be set aside and the interlocutory decree to be vacated, to the end that the appellant might, if it elected to do so, contest the suit on the merits; but, holding on to the substantial advantages secured by virtue of the stipulation, they asked to be, and were, by the judgment appealed from, relieved of the one and only obligation they agreed to perform as a consideration for the benefits thus received."

"In this there was manifest error, for which the judgment appealed from must be, and is, reversed, with instructions to strike out that portion thereof providing 'that the complainants * * * be not required to enter satisfaction of this decree, as provided by the sixth clause of the stipulation filed herein upon the 3d day of December, 1904.'"

The Court of Appeals dismissed this argument with the pronouncement, on an apparent unclean hands theory, that the Academy has no standing to complain of the disparate treatment (620 F.2d at 725). Yet the doctrine of these cases contemplates that one party may have been guilty of conduct permitting another to rescind. The Court of Appeals dismissed the argument on the further ground that the stipulation remained in the record. Yet the stipulation remained in the record because the Administrative Law Judge was required to decide whether or not the Regional Director's disapproval of the settlement was justified. The Academy gave timely notice that if the disapproval of the settlement agreement were upheld, there would be no proof of jurisdiction. Yet the General Counsel failed to seek reopening to introduce such proof. We contend that he did not do so because no such proof existed.

The well-accepted principle forbidding one-sided rescission should in all good conscience be enforced upon the National Labor Relations Board in its administration of

the settlement of labor disputes. The importance of settlement of labor disputes was emphasized recently by the Court of Appeals for the Fifth Circuit sitting in banc. In *Gulf States Manufacturers, Inc. v. NLRB,* 598 F.2d 896 (in banc, 5th Cir. 1979), the Court held that the National policy in favor of settlement of labor disputes required a limitation upon the discretion of the NLRB to set aside a withdrawal of charges which had been agreed upon as part of a settlement. The Court reasoned in that case that the incentives to an employer for voluntary disposition of labor disputes would be substantially eroded if the NLRB were to be permitted to reinstate withdrawn charges because of an unrelated violation by the Employer.

The reasoning of the Court in *Gulf States* is fully applicable to this case. The ruling of the Court of Appeals substantially erodes the incentives of a party—whether employer or union—to enter into a settlement agreement. A party must now recognize, at least in the Ninth Circuit, that the NLRB may subsequently choose to set aside a portion of such a settlement agreement, but nevertheless, enforce the remainder of it. We submit that, like the power the Board sought to exercise in *Gulf States,* such a power is inimical to the National policy in favor of voluntary settlement of labor disputes.

2. The Court of Appeals' Decision Conflicts with This Court's Recent Decisions in NLRB v. Yeshiva University, ... U.S. ....., 100 S.Ct. 856 (1980) and Trustees of Boston University v. NLRB, ... U.S. ....., 100 S.Ct. 1271 (1980), in holding without Adequate Factual Determination That the Academy's Department Heads and Art Instructors Are Not Exempted Managerial Employees Under the Yeshiva University Doctrine.

Prior to this Court's decision in *NLRB v. Yeshiva University,* ..... U.S. ....., 100 S.Ct. 856 (1980), the Board took

the position that the managerial employee concept did not apply to faculty members of a college (*id.* at 863). Since the Academy accordingly did not raise the issue, the Board made no findings as to whether or not the Academy of Art faculty members are managerial employees.

When the Academy raised the issue on appeal, the Court held that ordinarily such a controlling pronouncement of the Supreme Court as in *Yeshiva* would constitute an extraordinary circumstance under Section 8e of the National Labor Relations Act, which would permit an employer to raise such a jurisdictional issue for the first time on appeal. However, the Appellate Court opinion proceeds to determine that *Yeshiva* is not applicable because the Academy is not a "mature" university and that faculty members do not share a policy-making role (Appendix, p. 136).

The record contains no basis for such a distinction. In *Yeshiva University,* this Court emphasized the managerial aspect of the faculty committees (100 S.Ct. at 859), even though university-wide policies were formulated by the central administration with the approval of the Board of Trustees (*ibid.*). Similarly, at the Academy of Art, the Faculty Senate, which includes instructors and department heads, confers with the administration on all matters of scheduling and curriculum (supra, p. 7). The Faculty Senate discusses, among other matters, class size, curriculum, status of faculty members, student counseling, professional responsibilities of teachers, leaves of absences and terminations (supra, p. 7). The Senate is entrusted with the sole power to discharge faculty members. Indeed, in one of the consolidated cases, the Appellate Court's opinion holds the Academy guilty of discrimination by reason of a discharge by a faculty panel affirmed by the Faculty Senate (Appendix, p. 131). Six of the dischargees were

department heads. The Administrative Law Judge had found, "clearly, Stephens and Haight cannot effectively administer the entire school alone, and must rely, to some extent, upon intermediaries between them and rank-and-file instructors" (Appendix, p. 17). Surely, these are managerial powers under the *Yeshiva University* doctrine. Yet, the NLRB in this case ordered disestablishment of the Faculty Senate as a company union.

We believe that the few findings the NLRB made which can be applied to the question of managerial status prove that these employees are managerial. There is no basis in the record for the Court's opposite finding. The NLRB made no such finding. The Appellate Court purported to find, without factual analysis, that none of the department heads or instructors has managerial status. This summary conclusion is in contrast to the detailed analysis of the appellate court which was affirmed by the Supreme Court in *Yeshiva University*. The appellate court findings in *Yeshiva University* are discussed at 100 S.Ct. 859 to 860.

At the very least, this jurisdictional question should have been referred to the Administrative Law Judge with instructions to take evidence and make findings. The *Yeshiva University* doctrine deserves a more thorough consideration before being so limited as the Appellate Court has done. In *Trustees of Boston University v. NLRB*, ... U.S. ....., 100 S.Ct. 1271 (1980), this Court summarily vacated and remanded the case for reconsideration in the light of *Yeshiva University*. Yet, the Appellate Court's opinion in *Boston University* included a much more elaborate evaluation of managerial status of chairpersons (575 F. 2d 301 at 305) than the summary dismissal of the issue by the Court below.

We urge that on this ground alone, the Court should reverse and remand for reconsideration in the light of *Yeshiva University v. NLRB,* ..... U.S. ....., 100 S.Ct. 856 (1980).

3. CONCLUSION

We ask that this Court grant certiorari in order to consider whether the National Labor Relations Board has adopted an arbitrary practice in asserting a power to set aside portions of a settlement agreement and yet enforce another portion of the settlement against a party. We submit that, instead, an agency of the Government must act with substantial justice toward all parties who appear before it. If the Court should not choose to review this policy of the Board, we ask that the Court summarily reverse and remand the case for reconsideration in the light of *NLRB v. Yeshiva University,* ..... U.S. ....., 100 S.Ct. 856 (1980) as was done in *Trustees of Boston University v. NLRB,* ..... U.S. ....., 100 S.Ct. 1271 (1980).

Dated: August 18, 1980.

Respectfully submitted,

ACKERMAN, JOHNSTON, NORBERG & PARKINSON

By BENJAMIN H. PARKINSON
Benjamin H. Parkinson
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(Academy of Art College)

Appendix I

241 NLRB No. 71

FPT
D—4076
San Francisco, Calif.

United States of America
Before the National Labor Relations Board

Cases 20—CA—12367 and
20—CA—12422
Case 20—CA—13369

STEPHENS INSTITUTE, d/b/a ACADEMY OF ART COLLEGE

and

CALIFORNIA FEDERATION OF ART TEACHERS, LOCAL NO. ONE

STEPHENS INSTITUTE, d/b/a ACADEMY OF ART COLLEGE

and

CALIFORNIA FEDERATION OF ART TEACHERS, LOCAL NO. ONE

and

ACADEMY OF ART COLLEGE FACULTY SENATE
Party in Interest

DECISION AND ORDER

On March 23, 1978, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions and resubmitted as his brief to the Board his brief to the Administrative Law Judge. The Charging Party also filed limited cross-exceptions and a supporting brief. The Respondent then filed an answering brief and made a motion requesting the Board to hear oral argument in the instant case.[1] The General Counsel and the Charging Party opposed this motion and the General Counsel moved to strike the Respondent's answering brief. The Respondent subsequently filed a reply brief to the General Counsel's motion to strike its answering brief.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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1. The Respondent's request for oral argument is hereby denied, because the record, including the briefs, adequately presents the issues and positions of the parties.

2. The General Counsel's motion to strike the Respondent's answering brief is hereby denied.

Pursuant to Section 102.133(a) and (b) the General Counsel's motion to strike Respondent's November 2, 1978, and November 28, 1978, correspondence to the Board is hereby denied and that correspondence and the responses thereto are hereby made a part of the record in the instant proceeding.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions[4] of

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3. The Administrative Law Judge made several minor factual misstatements which do not affect the validity of his conclusions. Contrary to the Administrative Law Judge's decision, the record reveals that one of the instructors, Mike Dattel, had a contract of employment with the Respondent prior to January 1977. The record also reveals, contrary to what is indicated in the decision, that both Pratchenko and Rees have worked for the Respondent since January 1977, Pratchenko having had two of three classes canceled and Rees two of four classes canceled, in September 1977. The Administrative Law Judge also inadvertently excluded the name of Anna Rosich from the list of names of employees whom Stephens demanded sign a "standard teacher's contract," and included the names of Doyle and Sher, whom the record shows were not requested to sign such contracts. The Administrative Law Judge also stated in the decision that Sher and Wojak were the only instructors in the printmaking department at the time of the hearing. However, the record discloses that Sher was not employed by the Respondent after September 1977, and that one Jim Reed was teaching in that department. The decision also states that Haight testified that no striker listed on the revised schedule was given classes for the fall 1977 term. However, our review of the record shows that Haight did not so testify. We also correct the Administrative Law Judge's mistaken finding that the eight classes which the Respondent conducted during the fall 1977 term with less than minimum enrollments were conducted by nonstriking instructors; the record shows that only four of these classes were taught by nonstriking faculty members. We further note that the Respondent did not offer any evidence demonstrating that Wojak was offered classes, but failed to report for them.

The Respondent contends that Doyle and Pratchenko were supervisors, and, accordingly, it has no duty to reinstate them. The Administrative Law Judge found that Doyle, a cochairman of the fine arts department, had been demoted to the level of a rank-and-file instructor at the time of his termination and hence his status prior to that time was immaterial. The Administrative Law Judge also determined that Pratchenko, the other cochairman of the fine arts department, was not treated as, nor given the responsibility of, more than a rank-and-file instructor after mid-November 1976. Our review of the record persuades us that Doyle and Pratchenko at no time material to this proceeding had any supervisory authority regardless of any title by which the Respondent styled them. Accordingly, we find that neither man was a supervisor during the time pertinent to this proceeding.

4. The Administrative Law Judge inadvertently failed to include Rees on the list of persons denied employment in Conclusions of Law 6(c) of his Decision.

the Administrative Law Judge, to modify his remedy,[5] and to adopt his recommended Order, as modified herein.

The Respondent has vigorously contended that the consolidated complaint in the instant case must be dismissed because there is no proof in the record that it falls within the discretionary jurisdictional standard established by the Board for private schools. The only proof of jurisdiction, the Respondent points out, is contained in a stipulation of facts made pursuant to an informal partial settlement between the Respondent and the Charging Party. In this stipulation, the Respondent admitted facts which would permit the Board to find that the Respondent fell within the Board's statutory and discretionary jurisdictional amounts. The Respondent argues that the Board is not entitled to rely upon this stipulation in order to find jurisdiction. The efficacy of that stipulation, the Respondent contends, was vitiated when the Regional Director with-

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5. The Admnistrative Law Judge found that the Respondent discharged the unfair labor practice strikers by a letter dated January 28, 1977, which advised the strikers that those who did not return to work on January 31 would be "permanently replaced." We find merit in the cross-exception of the General Counsel, however, which contends that Stephens' letter of January 24, 1977, to the faculty constituted the discharge of the strikers. This letter stated that all instructors would be required to notify the Respondent by January 26 of their intention to teach "or their resignations would be regretfully accepted." Accordingly, we find the date of the unfair labor practice strikers' discharge to be January 24, 1977.

The Administrative Law Judge having found that the unfair labor practice strikers made an unconditional offer to return to work on February 16, 1977, ordered backpay, with interest, to commence on February 17, 1977. Consistent with our recent decision in *Abilities & Goodwill*, 241 NLRB No. 5 (1979), we hereby modify the remedy of the Administrative Law Judge to accord backpay to the unfair labor practice strikers from the date of their discharges, which we find to be January 24, 1977. Member Penello, in accord with his dissenting opinion in that case, would not modify the Administrative Law Judge's remedy.

drew approval of a separate informal settlement agreement that had been executed between it and the Board.

We find the Respondent's arguments on this issue wholly unpersuasive. As noted, the record demonstrates that the Respondent entered into two informal partial settlement agreements, one with the Charging Party, another with the Regional Director. The informal partial settlement agreement between the Respondent and the Regional Director settled certain allegations contained in the consolidated complaint in Cases 20—CA—12367 and 20—CA—12422, and the complaint was amended accordingly at the hearing. This settlement was contingent upon the Respondent's continued compliance with the terms of that agreement.

The Respondent also entered into an informal partial settlement agreement with the Charging Party in which the Respondent agreed, *inter alia,* to reinstate certain named individuals and the Charging Party agreed, *inter alia,* to request that the General Counsel withdraw certain paragraphs of the consolidated complaint. Pursuant to this agreement, these parties also entered into a stipulation of facts in which the Respondent admitted facts which brought it within the statutory and discretionary jurisdictional amount requirements of the Board. By the express terms of the agreement, this stipulation was to be "received into evidence in the unfair labor practice proceeding in Cases 20—CA—12367 and 20—CA—12422" and the facts admitted therein were to be "deemed true for the purposes of that proceeding." The Charging Party and the Respondent also agreed to enter into a Stipulation for Certification Upon Consent Election in which the Respondent also made factual admissions bringing it within the Board's statutory and discretionary jurisdictional amount requirements; pursuant to the terms of the agreement, this stipulation

was also entered into the record in the instant unfair labor practice proceeding.

The Respondent now contends that it was "manifestly unjust for the Administrative Law Judge to hold Respondent to the stipulation concerning jurisdiction which Respondent entered into only in the interest of settlement . . . and from which the Board has withdrawn." We perceive no unjust result that would arise in affirming the Administrative Law Judge's finding as to jurisdiction which was based upon the Respondent's stipulations. These stipulations, once entered into evidence, constituted a judicial admission on the Respondent's part as to the facts contained therein. Such an admission has the effect of a confessory pleading and its principal characteristic is that it is conclusive upon the party making it. Eg., *The Kroger Co., Houston Division,* 211 NLRB 363, 364 (1974); see, generally, 9 Wigmore, *A Treatise on Evidence in Trials at Common Law,* §§ 2588, 2590 (3d ed. 1940). The Respondent made these stipulations in contemplation of the hearing and expressly provided for them to be entered into and made a part of the record in the instant proceeding. At no time during the proceeding did the Respondent or any of the other parties to the instant case seek to withdraw from them or introduce evidence contrary thereto. To accept the Respondent's contentions on this matter would permit the Respondent to commit unfair labor practices *post* the hearing and in breach of the settlement agreement between it and the Region and be thereby relieved of admissions it had made on the record in the hearing by the Regional Director's issuance of a complaint based on the Respondent's unlawful conduct. Such a result would be wholly anomalous and it has no basis in law or logic. The only

case cited by the Respondent in support of its position, *Bogart v. United States,* 169 F.2d 210 (10th Cir. 1948), is not inconsistent with our holding in that at no time during the hearing herein did any of the parties seek to withdraw from the stipulations made in the stipulation of facts and the Stipulation for Certification Upon Consent Election. We thus find that the Respondent is bound by its stipulations and that the Administrative Law Judge properly found that the Respondent falls within the Board's jurisdiction.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Stephens Institute, d/b/a Academy of Art College, San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute "January 24" for "January 28" in paragraph 1(c)(2) and for "February 17" in paragraph 2(c).

2. Substitute the attached notice for that of the Administrative Law Judge.[6]

Dated, Washington, D.C. March 26, 1979

.....

John H. Fanning, Chairman

.....

John A. Penello, Member

.....

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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6. The attached notice adds the name of Joseph Rees to those employees named in the last paragraph of the Administrative Law Judge's notice.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act, in violation of Section 8(a)(1) of said Act by: interrogating our employees concerning their protected activities; threatening our employees with termination if they refused to sign individual employment contracts; threatening our employees with physical injury if they engage in future protected activity; threatening to lock out employees who support the California Federation of Art Teachers, Local No. One (Union); offering to employees more work at a higher salary if they will abandon their protected activity; soliciting employees to engage in surveillance of union meetings; or threatening to close our school rather than deal with the Union.

WE WILL NOT dominate, assist, contribute to the support of, or interfere with the Academy of Art College Faculty Senate (Faculty Senate), or give effect to the commitment made and distributed by us to our students and employees on June 8, 1977.

WE WILL NOT recognize the Faculty Senate, or any successor thereto, as the representative of our employees concerning wages, rates of pay, hours of employment, and other terms and conditions of employment.

WE WILL NOT vary or abandon any wage, hour, seniority, or other substantive benefit established for our employees because of the aforesaid agreement, or prejudice the asser-

tion by our employees of any right they have derived as a result of said agreement.

WE WILL NOT discharge our employees because of their union or other protected activities.

WE WILL NOT discharge our employees because of their participation in unfair labor practice strikes against us, or fail to reinstate them after they have made unconditional offers to return to work.

WE WILL NOT deny employment to our employees because they have engaged in union or other protected activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL withdraw and withhold recognition from, and completely disestablish, the Faculty Senate, or any successor thereto, as the representative of our employees for the purpose of collective bargaining, including the settlement of grievances.

WE WILL offer Joseph Doyle, Joseph Rees, and Paul Pratchenko immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings with interest.

WE WILL offer to each and all of the following named strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, replacement employees, and make said strikers whole for

any loss of earnings suffered by reason of our discrimination against them, with backpay to commence on January 24, 1977, with interest thereon: Leslie Becker, Karl Cohen, William Cutchins, Dennis Gray, Tom Keller, Anna Rosich, Elizabeth Sher, Mort Kohn, Jan Oswald, Ernest Posey, Julie Roman, Dave Sanchez, Louise Stanley, Jack Stone, Marion Swetschinski, Dick Warton, Tom Wojak, Beverly Wolfe, Joseph Doyle, Joseph Rees, Paul Pratchenko, and Kenneth Light.

WE WILL offer to each and all of the following named employees, effective from on or about September 1, 1977, teaching positions to which said employees ordinarily would have been assigned but for our discrimination against them, dismissing, if necessary, replacement employees, and make said named employees whole for any loss of earnings suffered by reason of our discrimination against them, with interest thereon: Joseph Doyle, Elizabeth Sher, Dave Sanchez, Mort Kohn, Kenneth Light, Ernest Posey, Julie Roman, Paul Pratchenko, Louise Stanley, Jack Stone, Tom Wojak, Marion Swetschinski, Karl Cohen, William Cutchins, and Joseph Rees.

STEPHENS INSTITUTE, d/b/a
ACADEMY OF ART COLLEGE
(Employer)

By .....
(Representative) (Title)

Dated .....

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 13018, Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone 415-556-0335.

JD-(SF)-63-78
San Francisco, Calif.

United States of America
Before the National Labor Relations Board

Division of Judges

Branch Office
San Francisco, California

Cases 20—CA—12367 and
20—CA—12422
Case 20—CA—13369

STEPHENS INSTITUTE, d/b/a ACADEMY OF ART COLLEGE
and
CALIFORNIA FEDERATION OF ART TEACHERS, LOCAL NO. ONE
STEPHENS INSTITUTE, d/b/a ACADEMY OF ART COLLEGE
and
CALIFORNIA FEDERATION OF ART TEACHERS, LOCAL NO. ONE
and
ACADEMY OF ART COLLEGE FACULTY SENATE
Party in Interest

Alan D. Longman, Esq., and
Richard D. Baum, Esq., for
the General Counsel.
Richard Harrington, Esq.,
Athearn, Chandler & Hoffman,
for the Respondent.
David J. Salniker, Esq.,
for the Charging Party.

DECISION

Statement of the Case

RUSSELL L. STEVENS, Administrative Law Judge: This matter was heard in San Francisco, California on August 4, 5, 8, 9 and 12, 1977,[1] and January 10 and 11, 1978.

The charge in Case No. 20-CA-12367 was filed on January 17 by California Federation of Art Teachers, Local No. One (Union). The initial charge in Case No. 20-CA-12422 was filed by the Union on February 1, and a first amended charge was filed in the case by the Union on March 28. By order dated April 29, the Regional Director for Region 20 of the National Labor Relations Board consolidated the aforesaid two cases and issued a consolidated complaint and notice of hearing. The consolidated complaint alleges that Stephens Institute, d/b/a Academy of Art College (Respondent) violated Section 8(a)(1), (3) and (5) of the National Relations Act (Act). Said consolidated cases were heard by the undersigned on various days in August 1977, as outlined above. At hearing, paragraphs VI and XII of the consolidated complaint, containing allegations of violations of Section 8(a)(5) of the Act, were deleted, and paragraph IX thereof was amended to delete names of certain alleged discriminatees, on the basis of a settlement agreement signed by the parties and approved by the Regional Director. Other allegations of the consolidated complaint were litigated.

On October 20 the aforesaid Regional Director withdrew approval of the settlement agreement, and on October 21 the Regional Director moved to reopen the record to amend the complaint and to consolidate Cases Nos. 20-CA-12367,

1. All dates hereinafter are within 1977, unless stated to be otherwise.

12422 and 13369. Said motion was granted by the undersigned on November 11. The complaint in Case No. 20-CA-13369,[2] based upon a charge filed by the Union on September 8, alleges that Respondent violated Section 8(a)(1), (2) and (3) of the Act. Those allegations were heard in January 1978, as described above.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Respondent and the Charging Party.

Upon the entire record,[3] and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

At all times material herein Respondent, a California corporation with its principal place of business located in San Francisco, California, has been engaged in the business of operating a private college for profit. Between February 1, 1976 and January 31, 1977, Respondent, in the course and conduct of its operations, derived gross revenues valued in excess of $1 million and purchased goods, materials and supplies valued in excess of $5,000 directly from suppliers located outside the State of California.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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2. As amended at trial, to correct a minor error.

3. General Counsel's motions to correct transcript, and to amend the complaint, made in post-trial brief, have been carefully considered and hereby are granted.

II. The Labor Organizations Involved

(a) The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

(b) One of the issues herein is whether the Academy of Art College Faculty Senate (Faculty Senate) is a labor organization within the meaning of Section 2(5) of the Act. It is found that the Faculty Senate is such a labor organization, as discussed *infra.*

III. The Alleged Unfair Labor Practices

Background and Chronology of Events

Respondent is a corporation, the principal stockholder and president of which is Richard A. Stephens (Stephens). Since 1929, Respondent has owned and operated an art college in San Francisco, presently housed in two buildings. One building is on Sutter Street, with facilities for departments of fine arts (painting and drawing), printmaking, sculpture and photography. The Powell Street building houses administrative offices, and departments of illustration, advertising and design. The school is accredited through the University of San Francisco and the National Association of Trade and Technical Schools, and is approved by the State of California, Bureau of Readjustment Education.

In the fall of 1976 the school had approximately 1,100 students, about 400 or 450 of whom were enrolled full time. Some students are excused from paying tuition, through a work-study program requiring that they devote some hours of work to the school.

Stephens is the principal administrative officer of the school. He is partially retired, but spends most of his time at the school, where he is involved primarily at the policy

level. He makes all basic decisions, including the hiring and firing of instructors,[4] but he relies upon others of his staff for assistance and advice. Stephens' principal assistant is Donald A. Haight (Haight), whose title is vice president and registrar. Haight is very active in administration of the school, and supervises most of the day-to-day work activities. Stephens also is assisted by Jan Schroeder (Schroeder), and by Michael Ryan (Ryan), who is the school's accountant. Haight, Schroeder and Ryan do not have authority to hire or fire, but they do have authority to appraise instructors' performances and to discipline instructors.[5] Schroeder and Ryan are outside the chain of command, which runs from Stephens, to Haight, to department chairmen or directly to instructors.

The school employs approximately 58 instructors[6] who teach in the various departments described *infra*. Most, or possibly all, departments have chairmen, although the departmental administrative arrangement never has been clear-cut and firmly established.[7] Duties and responsibilities of chairmen vary among departments, as size and complexity of departments vary, but generally, chairmen provide an administrative link between Stephens and instructors.

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4. Sometimes Stephens interviews, and hires and fires instructors, without coordinating the actions with departmental chairmen. On other occasions he coordinates with chairmen, or relies upon their assistance and recommendations.

5. It is found that Stephens, Haight, Schroeder and Ryan are supervisors within the meaning of the Act.

6. Sometimes referred to as teachers.

7. Respondent has no administrative organization chart. Respondent's Exhibit No. 18, prepared in 1972 for purposes not related to administration, is helpful in understanding the school, but is not accurate or reliable in resolving any issue herein. Respondent has no position descriptions for any of its employees, instructors or departmental chairmen, nor has it ever had such descriptions.

The title of "chairman" or "co-chairman" of a department does not necessarily define duties of those individuals as being supervisory within the meaning of the Act. All chairmen are not paid the same amounts. It is not entirely certain from the record that Stephens uses a "chairman" system in all departments, but clearly, Stephens and Haight cannot effectively administer the entire school alone, and must rely, to some extent, upon intermediaries between them and rank-and-file instructors.

The chairmen involved in this dispute are Joseph Doyle (co-chairman, fine arts department); Paul Pratchenko (co-chairman, fine arts department); Richard Warton (photography department); Thomas Keller (advertising department); Elizabeth Sher (printmaking department); Joseph Rees (sculpture department); and Barbara Bradley (illustration department).[8]

The dispute herein has its genesis in a petition[9] allegedly[10] drafted by a group of students. The petition lists six improvements that are sought, including one that covers contracts, better wages, insurance plans and paid independent study, all for faculty members. The petition is not dated, but testimony shows it was circulated, and Respondent learned of its existence, about mid-November 1976. On December 6, Stephens invited Doyle into his office and asked him about the petition. They discussed it, and Stephens asked that Doyle call a meeting to be attended

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8. All named chairmen hereinafter are referred to by their last names.

9. General Counsel's Exhibit No. 9.

10. Respondent believes that Doyle, who in the past for a time had been dropped by Respondent as an instructor, because of what Respondent thought was agitation of students against the school's administration, was instrumental in drafting and circulating the petition. Whether or not that is a fact, is immaterial to issues involved herein.

by Stephens, Doyle and Pratchenko, to pursue the subject. Stephens agreed to Doyle's request that Warton also attend. The meeting Stephens requested was held on December 8, initially attended by Stephens, Haight, Doyle, Pratchenko and, later, by Schroeder. The group discussed the petition, with some argument about whether or not Doyle and Pratchenko were behind the petition.[11] Stephens asked for a meeting to be attended by administration personnel, faculty and students. Such a meeting was held December 15. Stephens, Haight and Ryan attended, as did 10 to 15 faculty members and approximately 100 students. Stephens, Doyle, Pratchenko, Warton and others spoke, and Doyle suggested establishment of a faculty senate. David Sokol (Sokol), an attorney representing the students, appeared and spoke briefly. Matters were discussed that involved both faculty and students, and at the close of the meeting student officials were elected to begin organizing a student government. After the meeting, about 8 or 10 of the instructors met at a restaurant and discussed the necessity for the faculty to organize. During their discussion Haight, Haight's wife and Ryan sat at a table about 20 or 25 feet away.[12]

On December 21, Haight called Doyle on the telephone and asked him to come to Stephens' office on December 22. Doyle did as asked, and met with Stephens, Haight and

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11. Doyle testified that Stephens stated during the meeting that Doyle and Pratchenko "will never teach again." The statement attributed to Stephens was not denied by Stephens or Haight, and is credited for purposes of analyzing animus.

12. Possibly Haight and Ryan overheard part of the instructors' conversation. Based upon testimony, they were within earshot of reasonably loud conversation. In any event, it is found that, by this time, Respondent was well aware that Doyle, Pratchenko and Warton, among other teachers, were in active support of the principles set forth in the students' petition.

Ryan, in Stephens' office. The meeting became an argument about Doyle's class assignments, with Stephens advising Doyle that the remainder of his classes were being reduced, and with Doyle contending the reduction was retaliation for Doyle's support of students and the faculty. On December 24, Haight advised Doyle by telephone that Doyle was not going to be allowed to teach in the spring term.[13] Doyle later was terminated, by letter dated December 27.

Pursuant to discussion among instructors after the group meeting of December 15, an organization meeting was held at Rees' private studio on January 4, with approximately 10 instructors attending. A second meeting was held at Rees' studio the following day, January 5, attended by approximately 20-24 instructors. At the two meetings the group drafted a charter for California Federation of Art Teachers Local No. One (sometimes referred to as CFAT or the Union.[14] The charter was signed on January 5 by 13 instructors. Ernest Posey (Posey, an instructor) was elected business representative, Anna Rosich (Rosich, an instructor in graphic design) was elected secretary, and Doyle was elected treasurer. It was decided that Posey, Sher and Rees would be the negotiation committee.

Pursuant to decisions made at the meetings of January 4 and 5, the Union asked for, and held, a meeting with Stephens in his office on January 13. Present were Stephens, Haight, Ryan, Respondent's attorneys McDonald

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13. As discussed elsewhere, Doyle was on salary, which was paid whether or not he taught during a particular term of school. Although it is clear that Doyle had no teaching assignment for the spring 1977 term after this telephone conversation, it did not necessarily follow therefrom that he was discharged.

14. General Counsel's Exhibit No. 13.

and Kelly, Posey, Sher, Rees and Sokol. McDonald, Kelly and Sokol were asked to leave during the meeting. The Union did not claim majority representation, since it was not sure it had one, although it believed it represented approximately half the instructors. Following a discussion, it was agreed that the Union would draft a proposed contract for submission at a later meeting, scheduled for January 17. A proposal[15] was drafted as agreed, and the same group (without the attorneys) met on January 17. Stephens received the proposal, but said he could not give his answer until his attorney reviewed it. It was agreed that the group would meet on January 21 to discuss the proposal.

On January 18, Rees met with Stephens, Haight and Ryan in Stephens' office, in accordance with past practice, to discuss Rees' schedule for the following spring term. After the schedule was decided upon, Stephens handed Rees an individual work contract prepared by Respondent,[16] and Rees refused to sign it. Haight then handed to Rees a resignation slip,[17] and Rees refused to sign it.

Rosich went to Stephens' office on January 18 to discuss her spring schedule with Stephens and Haight. After the schedule was discussed, a contract form[18] was completed and Rosich signed it. Carl Cohen (Cohen, an instructor in film making) discussed his spring schedule with Stephens

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15. General Counsel's Exhibit No. 15.

16. The contract form was the same as the one presented to Rosich, discussed *infra*, which is General Counsel's Exhibit No. 17.

17. Rees testified, and neither Stephens nor Haight denied, that Stephens and Haight told him he must sign the resignation in order to receive his pay from the 1st to the 18th of January. Rees has attempted, without success, to collect his pay for the 18 days he worked in January.

18. General Counsel's Exhibit No. 17.

and Haight on January 18, and signed a contract[19] completed and handed to him by Stephens. Pratchenko met with Stephens and Haight on January 19, and was handed a work contract form similar to the one signed by Rosich and Cohen. Pratchenko did not sign the contract, but told Stephens he would take it to a union meeting that evening and would talk with him about it the following day.

A union meeting was held in Rees' studio during the evening of January 19, principally to discuss the fact that some instructors had been called to Stephens' office individually, and had been given to sign, contract forms prepared by Respondent. Approximately 20 or 25 instructors attended the meeting, including Doyle, Pratchenko, Rees, Rosich, Cohen and Keller. After discussing the actions taken by Stephens and Haight, the group took a strike vote and decided to strike the following day. A strike, and and picketing, commenced on January 20. On the day of the strike Pratchenko called Haight and told him he could not sign the contract received from Stephens. A conversation ensued, which is discussed *infra.*

On January 21 the union negotiating committee met with Stephens, Haight and Ryan, to discuss the Union's proposed contract handed to Stephens on January 17. The meeting was a lengthy one, during the course of which each provision was discussed. Stephens and Haight made several suggested changes, and Posey made notes of those suggested changes. Events that transpired at this meeting are in controversy, as discussed *infra.*

On January 23 the negotiating committee drafted a letter[20] to Stephens, which was delivered to him by Posey

19. General Counsel's Exhibit No. 18.

20. General Counsel's Exhibit No. 16.

on January 24. The letter covered the Union's reply to various suggestions made by Stephens and Haight during the meeting of January 21. An argument ensued between Posey and Stephens, and the latter told Posey to leave, as discussed *infra*.

The Union held a meeting the evening of January 24, during the course of which an instructor named John Morgan appeared as an emissary of Stephens. Morgan handed the group a box of letters and documents[21] for delivery to union members. The documents, with covering letters, are labelled "Commitment" by Respondent to the faculty, but the "Commitment" has several attributes of a labor agreement, although it is not a contract prepared for signatures. The letters and documents were distributed to those present at the meeting.

The next school term began January 31, and some of the strikers had been replaced by that time. By February 4 all the strikers had been replaced. A meeting was held in Stephens' office on February 4, attended by Stephens, Haight, Ryan and some of the nonstriking faculty. Purpose of the meeting was to discuss the possibility of the strikers' return to work, but no agreement was reached.

In his "Commitment" sent to instructors on January 24 (General Counsel's Exhibit No. 14), Stephens referred to the Faculty Senate in the following terms:

> SECTION 8 FACULTY SENATE AND REPRESENTATION:
>
> The Faculty Senate shall be comprised of all those faculty members wishing to voluntarily participate.
>
> The Faculty Senate Representatives shall be comprised of all Department Directors plus 3 elected representatives at large who serve on a term by term basis.

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21. General Counsel's Exhibit No. 14.

The Responsibilities of the Faculty Senate:

The Faculty Senate through its representatives shall meet and confer with the Administrators to discuss and negotiate various topics, problems and grievances. Example: see "Termination"—no faculty member shall be terminated without consultation with the Faculty Senate Representatives.

The Faculty Senate will meet a minimum of two meetings per semester; further meetings at the discression [sic] of the membership. The Faculty Senate Representatives will meet a minimum of once each 30 days at their discression [sic].

Scheduling and Curriculum: The Administration will meet and confer with the Faculty Senate Representatives on all matters of scheduling and curriculum.

The Faculty Senate described above was not activitated in formal manner, but from approximately January 24 until February 11, during the strike, certain of the nonstriking instructors met on a somewhat regular basis with Stephens, in the latter's office. On a date not definitely established at trial, it was determined by Stephens and the nonstriking faculty that the Faculty Senate membership would be changed, and rather than being a group comprising all the faculty, with elected representatives, it would consist of department directors (five in number) and five members to be elected from among the faculty. Following notice by letter dated February 15, a social-type meeting of the faculty was held on February 18, at which were discussed the organization of the Faculty Senate, election of representatives, and a few other matters of mutual concern which involved the Senate. Thereafter, the interim representatives, being the then five department directors and five full-time instructors who were, in effect, self-appointed by reason of volunteer service, met with

Stephens and other administrators in formal meetings. Such meetings were held on regular basis, with minutes kept at each meeting. The content of the meetings is discussed *infra*. Representatives to serve on the Senate were elected by faculty members and at a meeting held on April 29, Casey FitzSimons (FitzSimons) was voted as chairman, which position she has held to the present time. On May 23, Stephens addressed an open letter to all students, which discussed several matters of concern to them and which included the following statement:

> 9. Faculty Senate For the first time the Academy faculty has elected representatives meeting on a regular basis with the administration to resolve collective concerns and establishing equitable policies for students and teachers. The five elected representatives on the Faculty Senate are: Jon Morgan, Casey FitzSimons (President), Ron Young, Donald Archer and Bill Sanchez.

Because the original concept of the Faculty Senate had changed, FitzSimons drafted a new "Commitment" to reflect actual policies of Respondent. She used the original Commitment as a starting point, and also referred to other documents in preparing the new Commitment, which is dated June 8, 1977. FitzSimons discussed her draft of the new document with Stephens and Haight, and all except one of the Faculty Senate, at a meeting in Stephens' office. The group went through the document item by item, with full discussions thereon.[22] The new Commitment was approved,[23] and thereafter, the Faculty Senate met on a regu-

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22. Prior to the meeting, she had "gone over" the document with Haight.

23. The Faculty Senate has no constitution or bylaws. Its only basic document is the Commitment.

lar basis. The Senate continues to the present time to meet and act pursuant to the Commitment.

Pursuant to union vote, the Union's attorney sent a letter to Respondent dated February 16, offering unconditionally for the strikers to return to work. By reply letter dated February 17, Respondent's attorney asked for a list of strikers, contended that the strike was an economic one and that some strikers had been permanently replaced, denied the commission of any unfair labor practices, and denied National Labor Relations Board jurisdiction. The Union's attorney replied by letter dated February 23, listed the strikers, and asked for reinstatement of Doyle, who, it was contended, unlawfully had been discharged. By letter dated March 7, Respondent's attorney declined to reinstate Doyle, or to employ any striker.

The fall term commenced on September 6, 1977, and certain instructors involved in this controversy, discussed *infra,* either were offered no classes to teach, or were offered a reduced number of classes.

Issues

This controversy concerns several issues involved in 8(a)(1) allegations, but the principal issues are: (a) whether or not the Faculty Senate is a labor organization as that term is defined in the Act; (b) if the Faculty Senate is found to be a labor organization, whether or not it was dominated and assisted by Respondent; (c) whether the strike conducted by instructors in January and February was an unfair labor practice, or an economic, strike; (d) whether or not Doyle, Rees, Pratchenko, Keller, Sher and Warton were supervisors; (e) whether or not striking employees unlawfully were refused reinstatement; and (f) whether or not certain employees were denied employment because of their protected activities.

Alleged Unfair Labor Practices

A. *Interrogation by Stephens*

Paragraph VII(a) of the original consolidated complaint alleges that, on or about January 18, Stephens interrogated an employee about his and other employees' protected activities.

Cohen testified that, when he discussed Respondent's proposed contract with Stephens on January 18, they had a conversation which included the following:

> He then showed me a standard teaching contract and asked me to—he filled it out, and asked me to sign it. During the course of filling it out, at that time he asked me if I was aware that there was a union being formed and there was trouble or whatever, and I said, "Yes." And he asked if I had attended any union meetings and I again said, "Yes."

Neither Stephens nor Haight denied the alleged statement.

Cohen is credited. This allegation is proved.[24]

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24. Keller credibly testified that, just prior to January 20, he talked with Stephens on the telephone and Stephens asked him if he was participating in the group of teachers who were trying to organize. Stephens did not deny that testimony. The interrogation is not alleged as a separate violation of the Act, but the matter was fully litigated and is found to constitute an 8(a)(1) violation.

B. *Interrogation by Haight*

Paragraph VII(b) of the original consolidated complaint alleges that, on or about January 19, Haight interrogated an employee about his protected activities.

Pratchenko testified that, when he was discussing Respondent's contract form presented to him with a request for signature on January 19, he was interrogated by Stephens:

> Mr. Stephens said that, "if we wrote in the contract a clause that said, 'would you cross a picket line,' what would you say? How would you respond?" I said, "Well, you're asking me if I'll cross a picket line or not." He said, "Yes, I'm asking you if you will cross a picket line." I said I really couldn't tell until I take this contract to the union meeting and discuss that.

Stephens did not deny the alleged statement. Haight was present at the conversation, and did not deny that the statement was made. The fact that the statement is attributed by Pratchenko to Stephens, rather than to Haight, as alleged in the complaint, is immaterial.

Pratchenko is credited. This allegation is proved.

C. *Threats by Haight*

Paragraph VII(c) of the original consolidated complaint alleges that, on several occasions on or about January 18 and 19, Stephens and Haight threatened employees with termination if they refused to sign individual employment contracts.

Rees testified relative to his conversation with Stephens and Haight on January 18, when he was asked to sign the contract prepared by Respondent:

> "Well, I can't sign this." I said, "We're working on a contract and this, you know, this just doesn't work."
>
> At that point, Mr. Stephens got up and grabbed his pipe and walked behind his desk and responded to me, saying, "The contract you're working on would cause me to go broke, and I would just as soon put a lock on the door than accept the union contract."[25] And the next

25. This statement constitutes a separate violation of Section 8(a)(1) of the Act. The violation was not alleged in the complaint, but it was fully litigated at trial.

> thing was that Mr. Haight told me that if I didn't sign the contract, that I would be out. And I explained to him that there's no way I could.

Cohen testified relative to his conversation with Stephens and Haight on January 18, when he signed the contract prepared by Respondent:

> At the meeting, there was—from the solemn tone and the way he said, you know, "If you want to continue teaching here, sign."—I mean it was basically: I had a choice, of either signing or resigning my job. I mean that was implied, it wasn't spoken in so many words that you have to sign this or else. I mean it was quite clear, though.

Pratchenko testified relative to his conversation with Stephens and Haight on January 19, when he was asked to sign the contract prepared by Respondent: "Mr. Stephens gave me the contract, said that it was subject to alteration, but that either I would sign it or lose my job."

Stephens testified that no employee was told that it was necessary to sign a contract in order to work; that Rees did not make it clear that the instructors were negotiating a contract for the group; and that he thought the instructors wanted a contract, not a particular contract. This testimony is contrary to the facts of the case, is not believable, and is not credited.

Rees, Cohen and Pratchenko are credited. This allegation is supported by the record.

The record shows that no instructors had contracts of employment at any time prior to January 1977. It is clearly established that, but for protected activities of some of the instructors, contracts would not have been offered to instructors by Stephens in January. Stephens' offer of contracts was made after he met with the Union's negotiating

committee on January 14 and after he received the Union's written proposal on January 17. The contracts Stephens offered were different from the Union's proposal, and the Union had not agreed thereto. Stephens offered the contracts to individuals, not to the Union's negotiating committee. It is clear, therefore, that Stephens' threats constituted attempts on his part to fracture the Union's solidarity, deal individually with union members, and interfere with the union activities of the instructors, in violation of Section 8(a)(1) of the Act.

Rees and Pratchenko are alleged to be supervisors within the meaning of the Act. However, as discussed *infra,* that argument is without merit.

D. *Threat by Stephens*

Paragraph VII(d) of the original consolidated complaint alleges that, on or about January 24, Stephens threatened an employee with physical harm if that employee engaged in protected activity in the future.

Posey testified that, when he delivered to Stephens on January 24 the letter of the negotiating committtee replying to Stephens' proposed changes in contractual provisions, Stephens became angry and threatening:

> Mr. Stephens got very angry at me and he threw the letter that I had delivered on the table in front of me and said, "We'll fight you all the way, even if we have to close half of the school and start the semester with those people who are loyal to us." Then he rose from his desk and shook his finger at me and said, "If I ever see you around here again I'll knock your f..... head off."

Haight testified that, during the meeting of January 24, he, Stephens and Posey discussed the differences between

what Haight alleged was agreed to in the meeting of January 21, and the letter Posey brought back from the committee. Haight said an argument ensued, and:

> A. Mr. Stephens reacted similarly to the way I reacted and responded in a distressful way to Mr. Posey.
>
> Q. Well, what did he say?
>
> A. He said he'd knock Mr. Posey's f..... head off if he ever came back.
>
> Q. Is that all he said?
>
> A. And to get out of the building and not come back.
>
> Q. And did that terminate the meeting?
>
> A. That certainly terminated the meeting, yes.
>
> Q. And Mr. Posey left, is that right?
>
> A. Yes, he did, in a rush.

Posey is credited. The only reason for Stephens' threat, acknowledged by Haight,[26] was Posey's past, present and future activity related to the Union. This allegation is proved.

E. *Threat by Stephens*

Paragraph VII(e) of the original consolidated complaint alleges that, on or about January 24, Stephens threatened to lock out employees who supported the Union.

Posey testified as quoted in section D next preceding.

Neither Stephens nor Haight denied Posey's testimony. Posey is credited.

A lockout under the circumstances would have been solely for the purpose of stopping or interfering with union organization, which would have been a violation of the Act.

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26. Stephens was not questioned on this subject.

Hence, a threat of lockout, as here, was a violation of Section 8(a)(1) of the Act.

F. *Stephens' Unlawful Offer*

Paragraph VII(f) of the original consolidated complaint alleges that, on or about January 27, Stephens offered an employee more work at a higher salary if that employee would abandon his protected activity.

Warton testified that he was picketing on the night of February 2, when he was approached by Stephens:

> ..."Dick, what are you doing out here, you don't belong out here, you belong inside." And we had quite a discussion out in front of the building.
>
> Q. Okay. What was that discussion, Mr. Warton?
>
> A. Well, it was mainly that he would like to have had me come back inside, and he said, "I'll give you anything you want. You don't belong out here with the rest of them. You—some of the—most of these guys you're out here with wouldn't have a job if I didn't give them one." He said, "We'll take—we'll give Pratchenko a class and Doyle's — no, not Doyle, but — Rees, we'll give him the neon job, the neon sculpture class, and Anna Rosich, she's good, but the rest of them —." And I said, "Dick, you're dealing with—I'm dealing collectively in a union, I'm not dealing individually." And he said, Well, if you think that I'm going to deal with the union, you're crazy."[27] And I said, "Well, that's what I'm doing out here." And he said, "What do you want, how much do you want?" And I said, "It's not the money, it's the integrity." And then that's what ended the conversation, and he went back inside.

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27. F. 1. This statement of refusal to deal with the Union is an 8(a)(1) violation.

Stephens did not deny Warton's testimony. Warton was a very sincere, calm and impressive witness, and he is credited. The statements by Stephens clearly were designed to coerce and interfere with Warton's protected activity; they were implied and express promises of benefits if Warton abandoned that activity. This allegation is proved.[28]

G. *Stephens' Solicitation of Surveillance*

Paragraph VII of the complaint in Case No. 20-CA-13369 alleges that, on or about September 7, Stephens unlawfully solicited an employee to engage in surveillance of a union meeting.

Beverly Wolfe (Wolfe, a ceramics instructor) testified that she talked with Stephens at the time her first class started, on September 7:

> A. He mentioned the fact that we, meaning the union, was having a meeting the next night and that, you know, we would have to see what was going to be the result of that meeting.
>
> Q. You made reference to the union meeting that night.
>
> What did he say on that subject?
>
> A. Just that if, if it wasn't at all compromising to myself, if I could let him know what transpired or what the result of the meeting was.

Stephens testified:

> Q. Did you engage in surveillance of the union?
>
> A. Not directly and not purposefully and never followed up on it.

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28. Further support for this allegation is found in the credited testimony of Rosich, that Stephens approached her after the strike began, and offered her $1,000 per month instead of $50 per class if she would return to work.

The conversation that Ms. Wolfe relates is, in essence, true the way she says it, but I didn't search her out and I really had no interest in it.

Q. Did she ever report to you on the union activity?

A. No.

This allegation is proved.

H. *Terminations of Doyle, Rees and Pratchenko*

Paragraph VII of the original consolidated complaint alleges that Respondent terminated Doyle on or about December 27, 1977; Rees, on or about January 18; and Pratchenko, on or about January 20, because of their protected activities.

Respondent contends that the aforesaid three employees are supervisors, and that Respondent has no duty to reinstate them. Respondent further contends that only Doyle was terminated.

1. An initial question is whether the three employees were supervisors on the dates alleged above, regardless of what their employment status may have been prior to those dates.

Doyle first went to work for Respondent in the fall of 1973. He was hired by Stephens as an art instructor to teach painting for a salary of $40 per class. He taught thereafter on a regular basis, with the exception of one semester, when he did not teach because of Stephens' dissatisfaction with Doyle's agitation of students relative to conduct of Respondent's business.

Pratchenko first was hired by Stephens in the summer of 1974 to teach one figure drawing class at the rate of $40 per week. He taught regularly thereafter.

Prior to events discussed relative to this issue, Respondent's fine arts department was divided into two divisions. A Mr. Farella was chairman of the upper division, and a

Mr. Haberman was chairman of the lower division. Farella and Haberman resigned their positions as chairmen in the fall of 1975[29] and some time thereafter Stephens asked Pratchenko to assume the position of chairman of the fine arts department, which, in the meantime, had been reorganized to consolidate the upper and lower divisions into a single division. Pratchenko declined the offer, but said that, perhaps, he and Doyle could assume that position as co-chairmen. Doyle was approached by Stephens and Pratchenko, and after he agreed to the proposed arrangement, Doyle and Pratchenko were made co-chairmen of the fine arts department. As co-chairmen, each was given a salary of $600 per month,[30] which was a raise over their prior earnings, with an agreement that they would be given four classes each to instruct. However, their salary was to remain the same if all their classes were not filled and the total dropped below four and, further, they were to be paid during the summer and other recesses, even though they did not then teach. They were not given written position descriptions, or a written contract. Their actual duties are discussed *infra*.

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29. The exact date is not established in the record, but it appears that Doyle and Pratchenko became co-chairmen of the fine arts department in the fall or winter of 1975.

30. All department chairmen are on monthly salaries, except Sher, who is paid for classes taught. However, the fact of salary alone does not determine supervisory status; it is only a factor to be considered with others. Chairmen are not paid the same salaries, nor are their duties all the same. Some chairmen are "old-timers who have been given high salaries and a degree of responsibility that, possibly, makes them supervisors. An example of this is Barbara Bradley, chairman of the illustration department, who has been with Respondent for 19 years, is paid $2,000 per month, and is given much responsibility in scheduling classes, recommending raises, and hiring teachers. However, her authority is irrelevant so far as other chairmen are concerned, since there is no uniform position description for chairman, and they all have different authority and responsibilities.

Stephens' office formerly was in the Sutter Street building, but he moved his office in May 1976 to the Powell Street building. While he was at the Sutter Street location, Stephens was able to supervise the physical facilities of the building, and at times did some of the maintenance work himself, such as sweeping and cleaning. He relied upon department chairmen, Schroeder and work-study students to assist him in keeping the building in reasonably clean and proper condition.

Warton began teaching photography classes for Respondent in June 1974, at an initial wage of $40 per class, and later he received a raise to $50 per class. He taught regularly thereafter, and on January 1, 1976 was promoted by Stephens to chairman of the photography department at a salary of $15,000 per year. His duties are discussed *infra*. In late May 1976 he was asked by Stephens, who then was moving his office to the Powell Street building, to "become head of the Sutter Street building." Warton testified as follows relative to his new responsibility, and that testimony is corroborated by Stephens:

> A. Well, I was head of the building. I was not as such Director of Fine Arts. I was head of the building, and then yes I did have an office. Mr. Stephens wanted me to take over his office, which he was vacating on the ground floor, and I told him that I preferred to stay on the fourth [sic] floor, closer to the photography department, which I was heading.
>
> Q. Okay. Did Mr. Stephens tell you what your duties would be as head of the building?
>
> A. Loosely, he did, yes. Mainly he wanted me to be in charge of the building, to be there to make sure that the thing held together, to assist Jan Schroeder if she needed assistance, to be there if there was some-

body that wanted to tour the building, to find out things, to make sure that the building was maintained properly, and that if there were questions from other teachers in the Fine Arts department, that I could somehow convey them to the administration.

Q. Okay. Now did you receive any raise in pay as a result of your change of status?

A. Yes, I did.

Q. What was the change?

A. I was raised to $18,000 a year.

Warton further testified that Stephens told him he had consulted with Doyle, Pratchenko and Rees about the change, and the three concurred. Warton stated, "... I didn't take over somebody else's responsibilities, exactly, I just filled in a spot that needed filling in at the time." Warton received neither a written job description, nor a written employment contract. He continued his work as chairman of the photography department, and head of the Sutter Street building, until December 24, as discussed *infra*.

Doyle contends that, whatever his status may have been as co-chairman, he was relieved of that status "in the end of summer school" in 1976, and was replaced in that position by Warton. Doyle testified that, from and including the fall term of 1976, he was nothing more than a rank-and-file teacher of painting classes. He said he was given a raise at the end of August 1976, from $600 per month to $700 per month, at the time he was relieved as co-chairman of the fine arts department.

Pratchenko testified: He became dissatisfied with the position of co-chairman in July 1976, partially because he and Doyle were being given separate and different instructions, and because they were unable to obtain "specific guidelines" for their jobs as co-chairmen. Pratchenko said

he told Stephens that he wanted only to teach, and that Stephens agreed, saying "Fine. You can continue to teach four classes at $600 per month, with no administrative duties." Pratchenko testified that he and Doyle then met with Stephens, who told them Warton "was to take over the chairmanship of fine arts." Pratchenko taught three classes in the summer and four classes in the fall, and in August, he and Doyle were raised to $700 per month, with pay to continue during school breaks, without having to be at school.

Stephens testified that the co-chairman duties of Doyle and Pratchenko included building maintenance functions at the Sutter Street building. He said Doyle and Pratchenko were relieved of those building functions at the beginning of the 1976 fall term, when Warton took over the building, but that they were not relieved of any other duties as co-chairmen. Stephens testified that Doyle and Pratchenko had asked to be relieved of their building maintenance duties, and that he decided to accede to their request. Stephens and Haight stated that Doyle and Pratchenko continued to exercise their authority as co-chairmen until December, by making recommendations relative to the fine arts department, by signing documents as co-chairmen, by participating in discussions relative to schedules and assignment of work, and by recommending the hire of teachers.

Discussion

The first indication of organized activity protesting Respondent's administration is the student petition circulated at the school, discussed above. The petition is not dated, but it is found, based upon testimony of record, that the petition was circulated just prior to Thanksgiving. All activities of Respondent complained of herein occurred after circulation of the petition.

The foregoing testimony and evidence relative to the date when Doyle and Pratchenko were relieved of their positions as co-chairmen of the fine arts department are conflicting and inconclusive. Doyle and Pratchenko contend they were demoted by Stephens to rank-and-file instructors in late summer or early fall of 1976, but Stevens and Haight contend the two still exercised their authority as supervisors until December, when the critical events involved herein took place. Warton testified that, when he was placed in charge of the Sutter Street building in May, he did not take over anyone else's responsibilities; that he just "filled in a spot that needed filling in." There is no support for the testimony of Doyle and Pratchenko that Warton assumed the position of chairman of the fine arts department. Stephens denied that allegation, and Warton made it clear that he did not so understand his position.[31] It is found that Doyle and Pratchenko still were co-chairmen of the fine arts department, at least until December 1976. However, that finding does not resolve the basic issue.

After the student petition was circulated in November, a number of events and confrontations among Doyle, Prat-

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31. Pratchenko's testimony on this subject cannot be relied upon. It is clear from his statements that, whether or not he ever was a supervisor within the meaning of the Act, he was pleased with the position of co-chairman, enjoyed the responsibility involved, and expected to be treated by Stephens and Haight, the faculty and students, as occupying a position superior to that of a rank-and-file instructor. He was upset when he was not permitted to participate in preparation of the fall 1976 schedule, and he was annoyed when faculty members sought the advice of Warton, rather than him, after Warton became head of the Sutter Street building. He said he resigned the position of co-chairman after Warton was promoted, but he also testified that Stephens told him Warton had been appointed chairman of the fine arts department. Warton is qualified only in photography. Pratchenko is qualified primarily in painting, and secondarily in other fine arts. It is doubtful that Stephens would have made the statement attributed to him by Pratchenko, in view of the clear record that Warton never was chairman of the fine arts department.

chenko, Stephens and Haight occurred. A confrontation of importance took place on a date which Doyle said was December 22. Stephens said the date was December 21, but the difference is immaterial. The confrontation was attended by Doyle, Stephens, Haight and Ryan. Doyle testified: Among other things, Stephens informed him that three of his classes for the next term did not attract enough students to fill the classes, and that he would be permitted to teach only one class. Doyle protested, and said Stephens was punishing him because of his support of the students who had circulated the petition. An argument ensued, Doyle said he wanted a contract, $700 per month, and four classes, and Stephens said he would think about it. On December 24, Doyle talked with Haight on the telephone, Haight asked if Doyle then was ready to accept the one class Stephens offered at the meeting, and Doyle said yes. Haight then said he had been instructed to inform Doyle that if he wanted the class, the offer was withdrawn because of Doyle's hostility toward the administration. On December 27, Doyle received a discharge letter.[32]

Stephens testified: Sometime just prior to December 18, he talked with Haight about some classes, including Doyle's being too small, and advised Haight they would have to call Doyle in and cancel some of his proposed classes. Doyle came to see Stephens and Haight about the 18th of December, an argument ensued, and Doyle became upset and threatening. After Doyle left, Stephens apologized to Haight for not standing up to Doyle, and said, "So he is going to call, and when he does, whether he were to accept or decline, he will not be here again. I promise you, and I apologize again." Doyle called Haight on December 24, and was fired by Haight, verbally on the 24th and in writing on the 27th.

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32. General Counsel's Exhibit No. 10.

Haight testified: He and Stephens met with Doyle shortly after December 17, and they discussed the fact that some of Doyle's classes did not have enough students. Doyle became very upset, abusive, threatening and profane. Doyle was offered one class to teach, at a higher rate of pay, and he said he would call later on the telephone to give his decision. After Doyle left, Haight told Stephens that, if Stephens did not fire Doyle, he, Haight, would quit. Stephens replied that, if Doyle called back to accept the one class, Haight was to advise him that he had been terminated.

Some conflicts in the testimony relative to this issue are apparent, but they were resolved by Stephens, who made it clear on cross-examination that, regardless of events that led to Doyle's discharge, Doyle first was demoted, then fired. Stephens testified:

> Q. Now at the time that Doyle was terminated, he was not a department chairman, was he?
>
> A. He was a department chairman up until December—whenever we talked to him, which would be December 24th. I happen to remember it because I think that's Christmas Eve. I always considered him to be co-department chairman.
>
> Q. He was a co-department chairman when you told him you wanted him to teach only one class?
>
> A. That was one of the reasons he began to be disturbed.
>
> Q. Well, let me see if I understand this correctly. In late December—we're talking about the 18th or so—
>
> A. I think maybe—let's say the 21st.
>
> Q. 21st. You offered Mr. Doyle one class and told him that he was to be removed from his other three classes?
>
> A. That's right, and relieved of any other responsibilities.

Q. And any other responsibilities. And for that one class he was to receive $60 an hour per week?

A. $60 a class.

Q. A class.

A. Yes.

Q. Well, there was only one class. So it was $60 a week?

A. Yes, that's right.

Q. So he was no longer on salary?

A. That's correct.

Q. And then three days later he was fired?

A. I didn't have that conversation, but yes.

Q. So at the time of his termination, he was not a department chairman?

A. You mean the three days later?

Q. Yes.

A. Well, he had been department chairman until the day we demoted him.

Q. Yes, all right, fine, thank you.

JUDGE STEVENS: And the date of that demotion was?

WIT: The 21st of December.

JUDGE STEVENS: And he was demoted from what to what? Co-chairman of the department to?

WIT: To instructor.

JUDGE STEVENS: All right, thank you.

Q. And then he was fired on the 24th?

A. Whatever Mr. Haight said there, yes.

It is apparent from the foregoing testimony of Stephens that the question of Doyle's status prior to 3 days before he was fired is immaterial. When Doyle was fired he was an instructor, relieved of all other duties and clearly of rank-and-file status.

So far as Pratchenko is concerned, he testified: He, Doyle and Warton met with Haight and Stephens in the latter's office on December 8. Schroeder was present during

part of the meeting. Stephens called the meeting primarily to discuss the student petition, but some other matters were discussed. Stephens accused Doyle and Pratchenko of not "covering" for the administration, and accused them of being instrumental in preparing the petition. There was an argument, during the course of which Stephens told Pratchenko he never would teach again.

Doyle did not testify relative to Pratchenko's testimony concerning Stephens' statement about not teaching again, nor did Stephens or Haight. However, Haight testified that, during the meeting of December 8, a principal subject was the administration's discontent with the fact that Doyle and Pratchenko were not giving adequate counsel to students, which is a responsibility of department chairmen. Haight testified that the administration believed inadequate counseling was a principal cause for the student petition.

Haight testified that he first learned of the student petition in mid-November. Animosity of Stephens and Haight toward Doyle and Pratchenko, from approximately the day they learned of the petition, amply is shown by the record. (a) Approximately mid-November, according to Haight's testimony, the school prepared its schedule for the spring 1977 term. Department chairmen, including Doyle and Pratchenko, usually participated in preparation of schedules. However, Doyle and Pratchenko were not asked to participate in any way concerning the spring 1977 schedule. Stephens explained this by saying that they were required to submit the schedule on shorter notice than usual, hence there was no time to coordinate with Doyle and Pratchenko, but that explanation was not convincing and is not credited. (b) At the December 8 meeting, described above, Stephens and Haight discussed the student

petition in detail. Haight testified that he stated that Doyle and Pratchenko were responsible for the student problems because of their inadequate counseling. (c) On December 15 there was a faculty-student meeting, attended by Stephens, Haight and Ryan, among others, at which the student petition was presented to the administration. Pratchenko and Doyle spoke at the meeting, generally supporting the students' views. (d) On repeated occasions Stephens and Haight accused Pratchenko and Doyle of supporting the students against the administration, of doing their jobs improperly or inadequately, and not cooperating with the administration. (e) Doyle was demoted, and 3 days later terminated, in late December. At no time thereafter was Pratchenko advised relative to Doyle's replacement. (f) Pratchenko participated in the strike and picketing in January, but that action was not questioned by Stephens or Haight on the basis of supervisory status. (g) Pratchenko did not attend any school meeting after mid-November, in any capacity other than as a rank-and-file teacher. Whatever may have been Pratchenko's status prior to mid-November, he was not treated as, nor given the responsibility of, more than a rank-and-file instructor after that date. He did not participate in any administrative function; he had no counseling duties; his maintenance duties already had been taken over by Warton; and he made no recommendations concerning teacher assignments, new hires, discharges or schedules.

Based upon the foregoing, it is clear, and found, that Pratchenko was not a supervisor within the meaning of the Act, at any time after mid-November 1976, regardless of his status prior to that date.

Rees was hired by Stephens in the summer of 1973 as an instructor in sculpture, at $40 per class. He taught continuously until January 1977. At a time fixed differently by

Rees, Stephens and Haight, but at least by 1975, Rees was appointed chairman of the sculpture department, raised to a salary of $700 per month, and later to $750 per month. From about the time he was promoted, Rees was the senior teacher in sculpture, among the four usually employed. Rees was an evasive, unconvincing witness who avoided direct answers and who gave the distinct impression of trying to becloud the issue of his status. Although it appears doubtful that much of his testimony is reliable, he testified to some undisputed facts relative to his status: In addition to teaching, Rees supervised the maintenance of equipment, tools and machinery used in the department. As time went on after his promotion, he was given more to do. He counseled students, purchased supplies, had sole responsibility for designing and setting up the sculpture department, approved various forms for the sculpture department, and had an office with a desk. He talked with Stephens about Wolfe when the latter was hired; recommended that Laughler and Falconi be hired, and they were hired. He was paid salary during recesses, when he did not teach. Sometimes he advised instructors, and at times instructors would come to him for advice. He was the conduit for communication, when one was needed, between sculpture instructors and Stephens. There was a maintenance crew of two or three persons on his floor of the building, which he directed "at times."

Although Rees was less than candid, Stephens and Haight were even less convincing. Stephens testified: In January 1977 he talked with Rees about hiring teachers for the spring term of 1977. Rees recommended for hire (prior to the spring of 1977) teachers Falconi, Laughler, Lean[33] and Edwards. He discussed with Rees the discharge of Edwards

33. Various spellings by the reporter: Lein, Lean, Leen.

and Lean. Haight testified: Rees' recommendations for hire of the four teachers named above were followed "totally." The discharges of Edwards and Lean were discussed by Haight with Rees, who agreed thereto and who asked Haight to do the discharging, since Edwards was a close friend of Rees. The hire of Wolfe was discussed with Rees.

On rebuttal, Rees denied that he recommended the discharge of Edwards; he said he was informed about, rather than asked about, Edwards' difficulties; and he said he never recommended, or was asked about, the discharge of Lean.

It appears from the record that Rees, as a department chairman, was treated somewhat differently from Rees as an instructor. As chairman, he enjoyed some measure of prestige. He was senior instructor in sculpture. Occasionally he was consulted by management relative to departmental affairs. He kept the physical assets of the department in proper condition, although purchase orders had to be approved by Stephens. However, the record does not show that Rees supervised anyone.[34] There is no showing that he directed the work activities of any instructor on a regular basis, or that he disciplined any instructor. Possibly, but not certainly, he recommended some actions for the department to be taken by Stephens. The nature of his recommendations relative to Laughler and Falconi is far from clear, and it appears that those recommendations were incidental, rather than of a supervisory nature. It is clear that recommendations for the hire of instructors is on a free and easy basis at the school; it seems that almost everyone, including students, gets into the act. However, most important, it is quite clear that Stephens and Haight did not think

34. Edwards and Wolfe credibly testified that they never were told Rees had any authority over them. This testimony supports General Counsel's contention that Stephens and Haight were the effective supervisors of the sculpture department, rather than Rees.

of Rees as a supervisor until this case arose. It was not shown that Rees ever exercised independent judgment in any supervisorial function. When the union problem arose, Rees was not approached on the basis of a supervisory position; he was treated the same as all other instructors. It is found that Rees was not a supervisor at any time relevant herein. The question of the reason for his discharge is discussed *infra.*

2. Respondent alleges that Pratchenko and Rees were not terminated

Pratchenko testified that he called Haight by telephone on January 20, after their discussion on the preceding day wherein Pratchenko was asked to sign the contract prepared by Respondent. Pratchenko said he told Haight he didn't want to lose his job, but he could not sign the contract. Pratchenko then testified:

> ... Mr. Haight said, "Well, if you don't sign it, you know what it means." I said, "Well, what does it mean?" He said, "It means that you are terminated." And I said something to the effect, "That seems awfully final. Does that mean I'm fired?" He said, "Yes, you are fired." I said, "Well, okay. Can I collect my pay since I was on salary from the 1st to the 20th?" He said, "Yes, you can collect that from Mr. Ryan and we'll send you a letter notifying you of your termination. Goodbye." That was it.

Pratchenko testified that he attempted after January 20 to get a firm statement from Stephens as to whether or not he was fired, but was not successful. He has never received a discharge in writing, but he has been unable, even following court judgment, to collect pay due to him for work in January. Pratchenko has not received an unconditional offer for return to work, as discussed elsewhere, nor has he worked for Respondent since January 20. Stephens testified

that, during a conversation with Pratchenko after January 18, Pratchenko said, "He wasn't going to sign any contracts, and he wasn't going to work. Never." Stephens also testified that, during a group meeting in late January, Pratchenko asked, "Is Joe Rees fired?" and Stephens replied "No." Finally, Stephens testified that he never gave Pratchenko an offer of work at any time for the spring 1977 term.

It may well be that Pratchenko sometimes was referred to, or treated without distinction, as one of the group of instructors involved herein. He was a picketer, but that does not resolve the issue, nor is there validity to the argument that, since Pratchenko never received a written discharge, he was not fired. Pratchenko's version of the telephone conversation with Haight on January 20 is credited. Haight did not deny Pratchenko's testimony relative to this point. In view of the foregoing, and the facts that Pratchenko has not gone back to work and has been unable to collect his pay for work performed in January, it is clear beyond reasonable question, and it is found, that Pratchenko was fired on January 20.

So far as Rees is concerned, he testified that, following his refusal to sign Respondent's contract on January 18, discussed *supra*, he was asked to resign:

> ... So, then, Mr. Haight became kind of upset and he grabbed a piece of paper and he started writing out what he called my resignation. And of course I was like caught in this bind, and I told them, I said, "Well I'm not going to sign my resignation." And I got into the whole thing about how I had been at the Academy longer than Mr. Haight, and that I felt very responsible and I was interested in working the problems out, not walking away from them.
>
> Q. What further discussion took place?
>
> A. Well, not much except for I was told that I would receive a letter. And I got up and I left the room.

Rees said he never received the letter referred to by Haight, and he testified that he has not been paid for the 18 days he worked in January.

Haight testified relative to part of the conversation with Rees on January 18:

> Q. I see. And in the meeting with Mr. Rees, did you ask him to sign a resignation?
>
> A. When he was asked, "Was he going to work?" And he said, "No." Then I said, "Apparently you're not going to assist us in finding replacements?" He said, "No." And then I said, "Then you're apparently resigning, is that correct?" And he said, "No." I didn't know what he was doing. So I drafted a resignation for him on the spot, and asked him to sign it. Because I told him if he wasn't going to help us, I'd find somebody who would.
>
> Q. And he didn't sign the resignation?
>
> A. No.
>
> Q. He did not resign?
>
> A. In my estimation, he resigned.

Haight further testified that Rees never returned to work.

The arguments relative to Rees are similar to those relative to Pratchenko, discussed *supra*. Rees' testimony relative to the conversation at the meeting of January 18 is credited. In view of that fact, and the facts that Rees has not gone back to work and has been unable to collect his pay for work performed in January, it is well established, and it is found, that Rees was fired on January 18.

3. The remaining question on this issue is whether the three employees were fired because of their union or other protected activities.

So far as all three employees are concerned, there is no reasonable question concerning the reason for their dis-

charges. Counsel stipulated at trial the Union's status under the Act. All three employees had lengthy and satisfactory work histories with Respondent;[35] their first problems with Respondent arose upon their becoming involved with the student petition, and soon thereafter, becoming involved with the Union. Stephens and Haight learned of the student petition in mid-November. They discussed the petition with Doyle on December 6, and with Doyle and Pratchenko on December 8. At the faculty-student meeting on December 15, Doyle and Pratchenko, among others, supported the students rather than the administration. On December 22, Doyle's class load was reduced and, shortly thereafter, Doyle was demoted and, 3 days later, fired. There is no reasonable question that Doyle, whose relationship with Respondent prior to mid-November was good, was fired because of his support of the students and their petition, which included several matters directly related to working conditions of the teachers. Haight's testimony concerning Doyle's discharge appeared strained and unrealistic, and is not credited.

Pratchenko and Rees also had a good relationship with Respondent prior to mid-November. However, they became involved with the union movement in late December and early January, and by the time they were fired, that involvement was well known to Stephens and Haight. It is clear that the personal contracts offered to Pratchenko and Rees were attempts by Respondent to frustrate the Union's hope to obtain a group contract. It is equally clear that the two employees were fired because they declined to sign those contracts. Under such circumstances, and against the background of Respondent's animus against the Union, the dis-

35. Any earlier dissatisfaction with Doyle was forgiven upon his rehire.

charges of Pratchenko and Rees violated Section 8(a)(3) of the Act.

I. *The Strike and Nature Thereof*

1. Paragraph IX of the complaint alleges, *inter alia,* that employees were engaged in an unfair labor practice strike from January 20, 1977 until February 16, 1977. The alleged dates of the strike are confirmed by the record.

Respondent contends that the strike was for recognition, or was economic in nature, but that contention has no support in the record. It may well be, as Respondent argues, that an employer may require that an employee sign an employment agreement as a condition of work. However, that requirement can be imposed only in circumstances free from union activity. In this case Stephens demanded that employees Doyle, Pratchenko, Rees, Cohen and Sher sign Respondent's personal contracts at a time when Stephens and Haight were in the midst of negotiating a contract with the Union, as discussed *supra.* The clear purpose of that effort by Stephens was to interfere with the Union's organizational efforts, in violation of the Act. Further, by the time the strike commenced, Doyle and Rees had been terminated by Stephens because of their protected activity.

The employees met the evening of January 19, in an "emergency" session, to consider Respondent's actions, which, they believed, were unfair labor practices. After discussing incidents related to them by participants, which established to their satisfaction the illegality of Stephens' efforts to discourage the Union in its organizational efforts, the employees voted to go on strike. Nothing was said in that meeting, and nothing in the record even hints, about a strike for recognition, or for economic reasons. The employees struck, and picketed, solely because some of them were being threat-

ened, harassed and discharged because of their union activities.[36]

2. Employees' offer to return to work

The negotiating committee met with Stephens and Haight on January 28 in Stephens' office. Some of the strikers had been replaced, and Stephens offered reinstatement, with at least one class to teach, for all strikers, provided classes were available. That proposal was declined by the strikers. Just after that meeting, and prior to commencement of school on January 31, Stephens advised all strikers in writing[37] that those who did not return to work on January 31 would be "permanently replaced." This letter constituted, in effect, a discharge of the strikers.

The negotiating committee again met with Stephens and Haight on February 3, but no agreement was reached.

On February 4 a group meeting was held, attended by, among others, Stephens, Haight, striking faculty members and nonstriking faculty members. Stephens offered reinstatement of the strikers, on a selective basis.[38] That conditional offer was declined by the strikers.

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36. *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270. Respondent contends, through the testimony of Stephens and Haight, that the parties arrived at an agreement in Stephens' office on January 21. It is argued that the pencilled notes made by Posey on Respondent's Exhibit No. 4, together with the typed portion of the exhibit, represent the agreement of the parties, and that the Union violated that agreement by not adhering to it. That contention is without merit. Posey, who took the notes for the group, Rees and Sher testified that, at the meeting, Stephens and Haight gave their counterproposals to the negotiating committee, item by item, and Posey wrote the proposals down on Respondent's Exhibit No. 4. The employees further testified that they told Stephens and Haight they would take the counterproposals back to the Union for review. They said General Counsel's Exhibit No. 16 is the Union's response to Stephens. The employees' version is consistent with the chronology of events and exhibits of record, and is credited.

37. Respondent's Exhibit No. 8.

38. Some nonstrikers said they would not work with some of the strikers.

On February 14 or 15 the strikers met, and decided to offer unconditionally to return to work. By letter dated February 16, received by Respondent on February 17, the Union's attorney addressed Stephens as follows:

> I have been authorized by the California Federation of Art Teachers, Local No. One, its members and all persons participating in the strike against the Academy to offer unconditionally to return to work immediately. Accordingly, all strikers hereby offer unconditionally to return to their jobs immediately.
>
> In order to arrange a convenient and orderly return to work, please contact Ernest Posey to arrange reinstatement for the strikers. Please send a copy of all correspondence regarding reinstatement to me. These requests are not conditions upon our offer.

The offer was not accepted by Stephens. No striker was hired during the spring term.

3. Those employees on strike from January 20 through February 16, 1977, and who were not given jobs pursuant to their unconditional offer to return to work, were stipulated by counsel to be as follows:

> Leslie Becker, Karl Cohen, William Cutchins, Dennis Gray, Tom Keller, Anna Rosich, Elizabeth Sher, Mort Kohn, Jan Oswald, Ernest Posey, Julie Roman, Dave Sanchez, Louise Stanley, Jack Stone, Marion Swetschinski, Dick Warton, Tom Wojak and Beverly Wolfe.

In addition to the foregoing, the following persons, whose status is discussed *infra,* were strikers during the aforesaid period of time:

> Joseph Doyle, Joseph Rees, Elizabeth Sher, Paul Pratchenko and Kenneth Light.

It is found, above, that the strike was an unfair labor practice strike, and it is also found that, on January 28,

Respondent discharged the strikers named herein, because of their participation in the strike.[39] The strike continued until February 16, and none of the strikers were reinstated.

The strike ended on February 16. The strikers' offer to return to work, and to abandon the strike, having been received by Respondent on February 17, backpay of strikers will be recommended to commence on February 17, 1977.[40]

J. *Supervisory Status of Warton, Keller and Sher*

One of Respondent's defenses is that Warton, Keller and Sher are supervisors, hence there is no duty to reinstate them. The employment status of the three is discussed below.

1. Warton

When Warton agreed to become head of the photography department effective January 1, 1976, he was given a salary of $15,000 per year and was given the responsibility of "making a good photography department." He was told by Stephens that Warton would assist in scheduling classes, hire or at least recommend teachers for hiring in the photography department, be in charge of work-scholarship students, and be in charge of equipment. Thereafter, in May 1976, Warton was placed in charge of the Sutter Street building and raised to $18,000 per year, as discussed above.[41] Warton administered the photography department

39. Respondent's letter of January 24, written to all instructors, was a conditional offer of reinstatement which, if not accepted, would constitute a discharge. However, it is found that the actual discharge occurred on January 28.

40. As General Counsel discusses in his brief, Respondent sent offers of reinstatement to 22 striking teachers in July. Eighteen teachers accepted the offers. Offsets, if any, against backpay ordered herein can be applied in compliance proceedings.

41. A finding relative to supervisory status is not necessary, in view of later events. However, it is clear that, as of May 1976, Warton was a supervisor within the meaning of the Act.

and the Sutter Street building continuously after his two appointments. However, a change was made in his status on December 20, 1976.

Warton attended the administration-faculty-student meeting of December 15, and spoke on one occasion while there. He addressed some critical remarks to Stephens, who took exception to what Warton said. On December 17, Haight called Warton by telephone, and said Stephens would like to talk with him. Warton came to Stephens' office on December 20, and they had a conversation. Warton testified: Stephens started the conversation by asking, "How would you like to be relieved of your responsibilities and just teach?" Warton asked, "Relieved of all my responsibilities?" and Stephens said "Yes." Warton asked why, and Stephens said Warton was not doing the job the way they wanted it done; there had been complaints by instructors; and two of the teachers Warton hired should be fired. Warton asked if the reason was his remarks at the meeting of December 15, and Stephens said no. Stephens then talked about changes he was going to make. Warton replied:

> ... I said, "Well, that means I'm fired as far as department chairman?" And he said, "That's right." And he said, "You have three classes, we'll give you a raise now to $60 a class, which would be $180 a week." And I said, "Well, I didn't know whether I could accept that, but I would let them know." ...

Warton said he called Haight within a week, agreed to "just teach," and offered to break in "whatever replacement" was given the job Warton had. Warton thereafter attended union meetings, signed the union charter, and engaged in the strike and picketing.

Stephens corroborated Warton's testimony, and confirmed that he asked Warton in December "would he please become a teacher as he had been."

Haight, who attended the conversation between Warton and Stephens, corroborated the two accounts of the latter.

It is quite clear, based upon the foregoing, and found, that Warton was not a supervisor within the meaning of the Act, at any time after approximately December 20, 1976.

2. Keller

Keller was hired by Stephens in January 1976 as chairman of the advertising department. His duties were to teach, do advertising for the school, and counsel students. He monitored teacher attendance and teacher production. He was paid $1,500 per month, during all months, whether or not he was teaching. He prepared school advertisements and window displays, and supervised production of the school newspaper. He testified that he had implied authority to recommend hiring and firing, and that he made many such recommendations.[42]

Keller testified: He attended the administration-faculty-student meeting of December 15, and spoke briefly about the importance of student counseling. He met with Stephens, Haight and Ryan on December 20, or possibly December 28, at which time Stephens told him "that was the end of my chairmanship and that now, if I wanted to, I could teach some classes as an instructor." Tentatively, he was assigned three classes for the spring 1977 term, at $60 per class. Stephens said Mr. Dattel, who had been hired in November, would become chairman of the department instead of Keller.

Stephens testified that he was not satisfied with Keller's work as chairman of the advertising department, and that he discussed Keller's deficiencies with him. Stephens stated: "So it developed that we chose Mr. Dattel, and Mr. Keller

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42. A finding of supervisorial status of Keller is not necessary, as discussed *infra*, but it is clear that he was a supervisor within the meaning of the Act, until relieved of that responsibility.

was agreeable to teaching . . . ." Stephens said he advised Keller of his decision to replace him with Dattel about December 17 or 18.[43]

Haight testified that he had complained to Keller about the latter's work deficiencies, and that Dattel was hired as Keller's replacement in the position of chairman of the advertising department. Haight said Keller accepted the offer of a teaching job given to him by Stephens for the spring term of 1977.

Based upon the foregoing it is clear, and found, that Keller was not a supervisor within the meaning of the Act, after approximately December 20, 1976, when he became a rank-and-file teacher.[44]

3. Sher

Sher first was hired by Respondent in February 1974 as a printmaking instructor, and taught thereafter through the fall term of 1976. She was paid $40 per class until the fall of 1976, when she received $50 for one class and $40 each for two other classes per week. Sher described her duties as follows:

> A. I was responsible for ordering supplies for my own classes, and arranging the curriculum for my own classes, and making sure the equipment for my classes was working, and leaving a supply list for supplies the students would buy for the classes, and I had independent study students, and I graded students, and I counselled students on an informal basis.
>
> Q. What was the procedure on obtaining supplies?
>
> A. Well, the supplies that the students were to buy, I would submit a list to the school store to have those

43. Stephens later testified that it was his intention to have Dattel take over the department from Keller, at a salary of $18,000 per year. (See General Counsel's Exhibit No. 20.)

44. General Counsel did not allege that the demotions of Warton and Keller violated the Act, and no finding is made on that point.

> supplies available, and for other supplies, I obtained a purchase order from Mike Ryan, and for any individual supply over $25 I had to obtain permission from Mr. Stephens.

Sher testified that there was an attempt by the school in 1975 to establish "some kind of a structure" in the fine arts department, but there was no apparent success. She said she received a xerox "flyer" in her mailbox listing several department chairmen, showing her and Barbara Foster, the only teachers in the department, as chairmen. She said she does not think there is a chairman at the present time. Other teachers have taught in the department in the past, but presently there are only two, who are Sher and Tom Wojak. (Wojak). Sher said the only recommendation for hiring she has made was that of Carol Lane, whom she recommended as her replacement for one semester when Sher was on a leave of absence. She said she counsels students in the same manner as do all instructors, and that she approves, but does not sign, independent study contracts. She stated that she makes recommendations to Stephens relative to equipment for the department, which may or may not be followed; that Stephens makes all decisions on equipment purchases. Sher testified that no one has ever told her what her authority is, nor did she agree to, or discuss, the flyer she received in the mailbox in 1975.

Barbara Foster (Foster) testified that she worked for Respondent from February 1975 until January 13, 1977, in the printmaking department, with three other teachers: Sher, Lojak and Merrill Freedman. Foster said no one ever told her that Sher had any authority over her. She said she was told to report to Haight, and that, on one occasion, Haight reprimanded her.

Stephens testified that Sher was made chairman of the printmaking department in 1974, but that he does not remember telling her she was chairman.[45] Counsel stipulated that printmaking is one of the fine arts majors. Stephens said the only time he discussed personnel with Sher was after Foster left, and possibly on one other occasion when he already had someone in mind for a teaching position. Stephens said Sher only teaches three times each week, and the average class consists of four or five students.

Sher's testimony that she never was told that she had supervisory authority; that she never hired, fired, effectively recommended, directed or otherwise supervised other employees;[46] and that she did not consider herself as a supervisor, is given full credence. Foster corroborated much of Sher's testimony. Neither Stephens nor Haight testified to facts that appreciably differed from the testimony of Sher and Foster. It is abundantly clear, and found, that Sher was not a supervisor within the meaning of the Act, at any time relevant herein.

K. *8(a)(2) Allegations*

Paragraph VIII of Case No. 20-CA-13369 alleges that, since on or about March 9, 1977, Respondent unlawfully

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45. Stephens testified that he did not feel Foster was a chairman, but Respondent's Exhibit No. 5 shows both Sher and Foster as chairmen. Stephens could not explain this discrepancy, which dilutes the reliability of the exhibit.

46. Erin Theilacker testified that she was a work-study student in 1974 and 1975, and that she assisted both Sher and Foster in the printmaking department, at the direction of Stephens. Aside from the fact that work-study students are not paid for their work, other than by tuition, and are not employees in the true sense of the word, it is clear that Theilacker merely assisted Sher and Foster in an incidental manner. No element of the normal supervisor-employee relationship was present, and Theilacker's status did not result in making Sher and Foster her supervisors.

has dominated and assisted the Faculty Senate by acts and conducts discussed *infra.*

1. The Faculty Senate's status as a labor organization

Although, possibly, there have been a few instances in the history of Respondent when rudimentary faculty organizations were attempted, it is clear, as acknowledged by Stephens and FitzSimons, that there never has been a faculty senate, as that term is used in this case, prior to January 1977.

It is equally clear that, whatever the Faculty Senate was when it first was established by Stephens in the Commitment of January 24, that organization was changed, and the issue herein can be resolved on the basis of the Faculty Senate as it exists under the Revised Commitment of June 8, and under practice and procedures of Respondent acting pursuant thereto.

A basic inquiry is the reason for creation of the Faculty Senate. The controversy involved in this case arose in the fall of 1976, when a petition to Respondent appeared, allegedly prepared by students. It appears likely, as suspected by Respondent, that Doyle and, possibly, Pratchenko either thought of the petition or strongly encouraged it, since the petition is concerned with teacher problems as well as student problems. Among improvements sought by the petition are four directed to personal improvements for faculty members. However, regardless of the manner in which the improvements were suggested, at least 23 of Respondent's approximately 58 instructors working at that time pressed for those improvements to the point of striking when they were frustrated in their organizational attempts to obtain the improvements. When Stephens became aware of the teachers' organizational efforts, he mounted, with the support and assistance of Haight and others in the adminis-

tration, a campaign to defeat that organization. A rival organization, the Faculty Senate, suggested itself as a part of the campaign. The first attempt to create such an organization, in January, was feeble and incomplete, but the thought was there. The student petition sought improvements for teachers, by way of work contracts, better wages, insurance plans and paid independent study. Those improvements are found in the Revised Commitment at sections 3, 4 and 7. In addition, the Revised Commitment provides other improvements and benefits, several of which were suggested by teachers during the early stages of the controversy. In view of the facts that (a) no Faculty Senate existed prior to this controversy; (b) Respondent was strongly opposed to the Union; (c) Respondent availed itself of every oportunity to frustrate the Union and its representatives, and to encourage the Faculty Senate; and (d) the membership of the Senate effectively is controlled by Respondent, it is clear beyond any reasonable doubt that the purpose of the Senate's formation was to provide Respondent with a way to regulate working conditions through an in-house arrangement, rather than through negotiation with an independent union.[47]

The fact that the Revised Commitment provides a way to regulate working conditions through a controlled vehicle is apparent. (a) The entire Faculty Senate structure can be eliminated by Stephens, just as he caused its creation. The Commitment is no more than a statement of intention by Respondent; it is not an enforceable contract between legal entities. (b)Under the Commitment, department directors are appointed by the "administration," albeit

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47. Counsel stipulated that there are no authorization cards or membership applications signed by employees, designating the Faculty Senate to be employees' bargaining representative.

"with the advice of the Faculty Senate." The Senate is comprised of the five directors, five elected faculty members, and an eleventh faculty member chosen by the Senate to act as an "ombudsman." Since all the faculty is under the directors, or Stephens and Haight, it is most unlikely that the administration would encounter difficulty in getting the Senate to act in a manner desired by the administrators.

The fact that the Commitment is an arrangement to regulate working conditions, as well as matters of an administrative nature, is shown by the Commitment itself. The Commitment provides for status of faculty members, types of leave, hiring and termination, wages and benefits, severance pay, class type and grievances, among other things.

As a practical matter, the Faculty Senate meets regularly with Stephens and other members of the administration, and together they have discussed, and decided issues related to, election of Faculty Senate representatives, class size, curricula, progress of the NLRB case, status of faculty members, student counseling, professional responsibilities of teachers, leaves of absence, status of the Union, terminations of employees, grievances,[48] and many other matters.

FitzSimons was an unusually impressive witness. She was knowledgeable, sincere, calm and convincing. Her testimony was candid and free of antagonism, and she is credited.[49] She testified:

> Q. September 22nd wasn't the first time that you had considered having a Faculty Senate election, was it?
>
> A. No. As a matter of fact, we were trying to debate about what was going to happen. The situation

48. Prior to the Commitment, Respondent had no formal grievance procedure.

49. The summary herein of Faculty Senate discussions is drawn from FitzSimons' credited and unchallenged testimony.

was that the previous semester when we set up the term of office as running roughly from October to October for the Faculty Senate, we knew that the election would be held in late September or early October, something like that, and then we find out that this Board election comes in. It was going to inundate the faculty and probably confuse them as to what they were voting for, up to a point, if they weren't really up-to-date on it, and I think what we were doing was, we were going to wait and see the outcome of the Board election because if the Union had prevailed on the Board election, my understanding was that the Faculty Senate, the whole effect of that would be vitiated. There would be no need for it any longer.

CROSS-EXAMINATION

Q. (By Mr. Harrington) What did you understand the obligation of the Faculty Senate would be if the Union won the NLRB election?

A. I think the Academy would then be required to bargain collectively with the Union on terms and conditions of employment.

Based upon the foregoing, it is clear that the Faculty Senate is in the nature of an employer's committee, established to deal with the Employer on behalf of all faculty members, relative to wages, hours and working conditions, among other things. Such a committee is a labor organization within the meaning of the Act.[50] The fact that the Senate is not formally organized, with a constitution and bylaws, is immaterial.[51]

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50. *N.L.R.B. v. Cabot Carbon Co., et al.*, 360 U.S. 203; *Alta Bates Hospital*, 226 NLRB 485.

51. *North American Rockwell*, 191 NLRB 833.

2. Respondent's domination of, and assistance to, the Faculty Senate are shown by the following:

(a) The testimony of FitzSimons, Stephens and Haight establishes that Respondent negotiated working and other conditions with the Faculty Senate during preparation of the Revised Commitment and thereafter.

(b) Through appointment of department directors, Stephens effectively designated 5 of the 10 members of the Faculty Senate.

(c) Counsel stipulated that the Faculty Senate has no funds of its own, and that all of the Senate's expenses are paid for by Respondent.

(d) Counsel stipulated that Respondent has provided all facilities, equipment, clerical services and mailing expenses required by the Faculty Senate.

(e) Counsel stipulated that Stephens, Haight and Schroeder have attended meetings of the Faculty Senate since March 9, 1977.

In view of the Faculty Senate's status as a labor organization, and the Senate's domination by and assistance received from Respondent, this allegation is proved.

L. *Denial of Employment*

Paragraph IX of the complaint in Case No. 20-CA-13369 alleges that, from on or about September 1, 1977 through about September 15, 1977, Respondent denied employment to the following teachers, because of their protected activity:

Joseph Doyle	Ernest Posey	Tom Wojak
Elizabeth Sher	Julie Roman	Marion Swetschinski
Dave Sanchez	Paul Pratchenko	Karl Cohen
Mort Kohn	Louise Stanley	William Cutchins
Kenneth Light	Jack Stone	

Counsel stipulated that, on September 1, 1977, Respondent cancelled classes as follows:

Joseph Doyle	1 class
Elizabeth Sher	3 classes
David Sanchez	1 class
Mort Kohn	1 class
Ken Light[52]	1 class
Ernest Posey	9 out of 10 scheduled classes
Julie Norman	1 class
Paul Pratchenko	2 out of 3 scheduled classes
Louise Stanley	1 class
Jack Stone	1 class
Marion Swetschinski	1 class
Karl Cohen	3 classes
Joe Rees	2 out of 4 scheduled classes

Tom Wojak and William Cutchins were named in the complaint as having been denied employment, but those two were not included within the stipulation of counsel. However, the two were stipulated to have been strikers, and Haight testified that no striker listed on the initial schedule or the revised schedule[53] was given classes for the fall term of 1977.

Based upon the record and stipulations of counsel, it is clear that: (a) Respondent strongly opposed the Union, and deeply resented the strike and those who participated in it. (b) The Faculty Senate was created in order to negate or destroy the Union. (c) In creating the Faculty Senate, Stephens relied upon nonstriking faculty members, and prior to creation of the Senate, there was a sharp

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52. Counsel stipulated that, if called to testify, Light would testify that he was hired by Mr. Dick Warton to teach at the Academy of Art College for the spring term 1977 beginning January 31, 1977, and accepted that employment and was scheduled to teach for that term, and that prior to the start of the term on January 31, Mr. Light participated in the strike called by CFAT.

53. General Counsel's Exhibit Nos. 50 and 51.

cleavage between strikers and nonstrikers. Some of the latter said they would not work with the strikers. (d) By the time of the fall term, which started in September 1977, the Faculty Senate was a going concern, and the administration was deeply involved with it relative to the faculty's wages, hours, and working conditions, as well as other matters. (e) No striker was on the Faculty Senate, nor did any striker vote for faculty representatives. (f) No striker was given a normal teaching schedule for the fall term, and some were given no classes to teach. (g) Respondent hired several new instructors in the fall of 1977, some of whom taught classes which some of the strikers were qualified to teach. (h) Some classes were split, with junior, nonstriking instructors given a split class when otherwise they would have had no class. (i) Eight less-than-minimum classes were conducted, but they were taught by nonstriking instructors. (j) Respondent failed to provide students an adequate opportunity to register for classes of returning strikers.

General Counsel thus created the inference that those teachers named above were denied teaching opportunities because of their striking and their support of the Union.

Respondent offered, by way of rebuttal, the following testimony and evidence to show that those who were not given normal teaching opportunities were so denied because of business reasons: (a) Because of the strike, the number of registrants for the fall term dropped drastically from pre-strike totals, thus fewer teachers were required in the fall.[54] (b) All strikers were offered reinstatement in July and, in addition, offers of reinstatement were given in July to Doyle, Pratchenko, Rees, Sher, Keller and Warton, all of whom accepted except Warton. (c) Some classes were

54. Haight credibly testified that pre-strike student population was 1135 in 119 classes and that post-strike totals were 845 students in 158 classes.

cancelled because of less-than-minimum enrollment, including classes for two nonstriking teachers. (d) Some of the strikers taught advanced courses, and many registrants for the fall term were new students who wanted elementary courses. (e) Wojak was offered classes, but did not report for them. (f) Haight and Stephens testified that they issued instructions to department directors to show no prejudice toward any teacher.

Discussion

Respondent's antipathy toward the Union and its supporters, displayed by the intensive and pervasive unfair labor practices discussed herein, makes it clear that every effort would be made to reward the administration's supporters and to retaliate against union supporters. There is no indication that any of the teachers named in this allegation experienced any difficulty obtaining teaching assignments in the past, even though some of them have taught for Respondent each year during the past several years. The fall term of 1977 was the first term following inception of this controversy that afforded Respondent an opportunity to freeze out those teachers whom it resented, and that is the action that was taken.

Haight, who was Respondent's principal witness on this issue, explained the otherwise unusual failure to find classes for so many experienced teachers by stating that he merely followed the schools' rules relative to minimum classes. However, that explanation is not convincing. First, such extensive failures to meet minimum classes were not shown to have arisen in the past. Second, it violates common sense to say that all above-minimum classes just happened to be taught by antiunion instructors, and all union supporters just happened to have no classes, or only a severely curtailed number of classes to teach, especially in view of Respondent's strong antiunion animus. Third, Haight

is in virtually complete control of registration of students, scheduling of classes, and assignment of teachers. Any explanation he gives is based upon his subjective reasoning. His explanations were general in nature, and the facts he said he relied upon either were not presented or were subject to more than one interpretation. For instance, he explained the size of some classes by saying that sometimes the same number who registered did not actually appear for the classes, but no specific figures or classes were given. Again, alleged fluctuation among registration figures, enrollment figures, and actual attendance were used to explain why classes were or were not split, but no specific examples were shown. Fourth, even though registration figures for the fall term were substantially below those of the year before, several new teachers were hired. Haight explained that the new teachers were for subjects the union supporters were not qualified to teach, but that explanation did not withstand cross-examination.

It is clear from the foregoing that the teachers named above were not given classes on a basis free from antiunion animus. It may be that, in some instances, classes would not have been available, or accepted, even in the absence of discriminatory treatment, but that is a subject that can be explored at the compliance stage. Suffice it for these proceedings to find that class assignments for the fall term intentionally were made by Respondent to favor antiunion teachers, or neutrals, and to retaliate against union supporters named above. Assignments should have been made on the basis of experience, past practice, and regularly accepted criteria, free from any consideration related to union or protected activities.

This allegation was proved.

IV. The Effect of the Unfair Labor Practices Upon Commerce

Respondent's activities set forth in section III, above, occurring in connection with the operations of Respondent described in section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Sections 8(a)(1), (2) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent unlawfully discharged its employees Doyle, Rees and Pratchenko. I will, therefore, recommend that Respondent offer Doyle, Rees and Pratchenko their former jobs or, if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings suffered by reason of the discrimination against them, by payment to them of sums of money equal to that which they normally would have earned, absent the discrimination, less net earnings during such period, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Florida Steel Corporation,* 231 NLRB No. 117 (1977).[55]

It has been found that, on January 28, 1977, Respondent unlawfully discharged all employees named hereinbelow,

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55. See generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

who engaged in an unfair labor practice strike from January 20, 1977 until February 16, 1977. I will recommend that Respondent offer to each and all strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, replacement teachers, and make said strikers whole for any loss of earnings suffered by reason of the discrimination against them, with backpay to commence on February 17, with interest thereon to be computed as described above.

It has been found that, from on or about September 1, 1977, Respondent denied employment to its employees named hereinbelow. I will recommend that those employees be offered teaching positions to which they ordinarily would have been assigned, but for the discrimination against them, commencing with the start of the fall term of Respondent in 1977, dismissing, if necessary, replacement employees, and make said named employees whole for any loss of earnings suffered by reason of the discrimination against them, with interest thereon to be computed as set forth above.[56]

Upon the basis of the foregoing findings of fact, and upon the entire record, I hereby make the following:

Conclusions of Law

1. Stephens Institute, d/b/a Academy of Art College is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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56. Respondent has paid to some discriminatees, pursuant to the settlement agreement described above, certain sums of money as backpay. All such sums can be ascertained in compliance proceedings, and deducted from any sums found due and owing pursuant to this decision.

2. California Federation of Art Teachers, Local No. One and the Academy of Art College Faculty Senate, are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by interrogating its employees concerning their protected activities; threatening its employees with termination if they refused to sign individual employment contracts; threatening its employees with physical injury if those employees engaged in future protected activity; threatening to lock out employees who supported the Union; offering to employees more work at a higher salary if the employees would abandon their protected activity; soliciting employees to engage in surveillance of a union meeting; and threatening to close the school rather than deal with the Union.

4. The strike of Respondent's employees from January 20 until February 16, 1977, was an unfair labor practice strike.

5. Respondent violated Section 8(a)(2) and (1) of the Act by: (a) Dominating, assisting and contributing to the support of, and interfering with, the Academy of Art College Faculty Senate, and by giving effect to the Commitment made and distributed by Respondent to students and employees of Respondent on June 8, 1977. (b) Recognizing the Academy of Art College Faculty Senate as the representative of its employees concerning wages, rates of pay, hours of employment, and other terms and conditions of employment.

6. Respondent violated Section 8(a)(3) and (1) of the Act: (a) By discharging employees Joseph Doyle on December 27, 1976, Joseph Rees on January 18, 1977, and Paul Pratchenko on January 20, 1977, because of their pro-

tected activities. (b) By discharging the following named employees on January 28 because of their participating in an unfair labor practice strike, and failing to reinstate said employees after the employees made an unconditional offer on February 16 to return to work:

Leslie Becker	Jan Oswald	Tom Wojak
Karl Cohen	Ernest Posey	Beverly Wolfe
William Cutchins	Julie Roman	Joseph Doyle
Dennis Gray	Dave Sanchez	Joseph Rees
Tom Keller	Louise Stanley	Paul Pratchenko
Anna Rosich	Jack Stone	Kenneth Light
Elizabeth Sher	Marion Swetschinski	
Mort Kohn	Dick Warton	

(c) By denying employment to the following named employees from and after September 1, 1977, because said employees engaged in protected activity:

Joseph Doyle	Ernest Posey	Tom Wojak
Elizabeth Sher	Julie Roman	Marion Swetschinski
Dave Sanchez	Paul Pratchenko	Karl Cohen
Mort Kohn	Louise Stanley	William Cutchins
Kenneth Light	Jack Stone	

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[57]

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57. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Stephens Institute, d/b/a Academy of Art College, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act, in violation of Section 8(a)(1) of said Act by: interrogating its employees concerning their protected activities; threatening its employees with termination if they refused to sign individual employment contracts; threatening its employees with physical injury if those employees engage in future protected activity; threatening to lock out employees who supported the Union; offering to employees more work at a higher salary if the employees would abandon their protected activity; soliciting employees to engage in surveillance of union meetings; and threatening to close the school rather than deal with the Union.

(b) Violating Section 8(a)(2) and (1) of the Act by: dominating, assisting and contributing to the support of, and interfering with, the Academy of Art College Faculty Senate; giving effect to the Commitment made and distributed by Respondent to students and employees of Respondent on June 8, 1977; and recognizing the Academy of Art College Faculty Senate, or any successor thereto, as the representative of its employees concerning wages, rates of pay, hours of employment, and other terms and conditions of employment. Provided, however, that nothing in this Order shall require or authorize Respondent to vary or abandon any wage, hour, seniority, or other substantive benefit it has established for its employees because of the aforesaid agreeemnt, or to prejudice the assertion by its employees of any rights they derived as a result of said agreement; and further provided, that nothing herein shall

be construed as prohibiting its employees from forming, joining or assisting any labor organization.

(c) Violating Section 8(a)(3) and (1) of the Act by:

(1) Discharging employees Joseph Doyle on December 27, 1976, Joseph Rees on January 18, 1977, and Paul Pratchenko on January 20, 1977, because of their protected activities;

(2) Discharging the employees named above in conclusion No. 6(b), on January 28, because of their participating in an unfair labor practice strike, and failing to reinstate said employees after the employees made an unconditional offer on February 16 to return to work; and

(3) Denying employment to the employees named above in conclusion No. 6(c), from and after September 1, 1977, because said employees engaged in protected activity.

(f) In any other manner interfering with, restraining or coercing employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Withdraw and withhold recognition from, and completely disestablish, the Academy of Art College Faculty Senate, or any successor thereto, as the representative of its employees for the purpose of collective bargaining, including the settlement of grievances.

(b) Offer Joseph Doyle, Joseph Rees and Paul Pratchenko immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equiva-

lent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings in the manner set forth in the "Remedy" section of this Decision.

(c) Offer to each and all strikers, named above in conclusion No. 6(b), immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, replacement employees, and make said strikers whole for any loss of earnings suffered by reason of the discrimination against them, with backpay to commence on February 17, with interest thereon to be computed as described in the "Remedy" section hereof.

(d) Offer to each and all employees named above in conclusion No. 6(c) teaching positions, effective from on or about September 1, 1977, to which said employees ordinarily would have been assigned but for Respondent's discrimination against them, dismissing, if necessary, replacement employees, and make said named employees whole for any loss of earnings suffered by reason of Respondent's discrimination against them, with interest thereon to be computed in the manner set forth in the "Remedy" section of this Decision.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its San Francisco, California place of business copies of the attached notice marked "Appendix."[58] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(g) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: March 23, 1978

RUSSELL L. STEVENS
Russell L. Stevens
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act, in violation of Section 8(a)(1) of said Act by: interrogating our employees concerning their protected activities; threatening our employees with termination if they refused to sign individual employment contracts; threatening our employees

58. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

with physical injury if those employees engage in future protected activity; threatening to lock out employees who support the California Federation of Art Teachers, Local No. One (Union); offering to employees more work at a higher salary if the employees will abandon their protected activity; soliciting employees to engage in surveillance of union meetings; or by threatening to close our school rather than deal with the Union.

WE WILL NOT dominate, assist, contribute to the support of, or interfere with, the Academy of Art College Faculty Senate (Faculty Senate), or give effect to the Commitment made and distributed by us to our students and employees on June 8, 1977.

WE WILL NOT recognize the Faculty Senate, or any successor thereto, as the representative of our employees concerning wages, rates of pay, hours of employment, and other terms and conditions of employment.

WE WILL NOT vary or abandon any wage, hour, seniority, or other substantive benefit established for our employees because of the aforesaid agreement, or prejudice the assertion by our employees of any right they have derived as a result of said agreement.

WE WILL NOT discharge our employees because of their union or other protected activities.

WE WILL NOT discharge our employees because of their participation in unfair labor practice strikes against us, or fail to reinstate such employees after they have made unconditional offers to return to work.

WE WILL NOT deny employment to our employees because those employees have engaged in union or other protected activity.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of their rights

to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL withdraw and withhold recognition from, and completely disestablish the Faculty Senate, or any successor thereto, as the representative of our employees for the purpose of collective bargaining, including the settlement of grievances.

WE WILL offer Joseph Doyle, Joseph Rees, and Paul Pratchenko immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings with interest.

WE WILL offer to each and all of the following named strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, replacement employees, and make said strikers whole for any loss of earnings suffered by reason of our discrimination against them, with backpay to commence on February 17, 1977, with interest thereon: Leslie Becker, Karl Cohen, William Cutchins, Dennis Gray, Tom Keller, Anna Rosich, Elizabeth Sher, Mort Kohn, Jan Oswald, Ernest Posey, Julie Roman, Dave Sanchez, Louise Stanley, Jack Stone, Marion Swetschinski, Dick Warton, Tom Wojak, Beverly Wolfe, Joseph Doyle, Joseph Rees, Paul Pratchenko and Kenneth Light.

WE WILL offer to each and all of the following named employees, effective from on or about September 1, 1977, teaching positions to which said employees ordinarily would

have been assigned but for our discrimination against them, dismissing, if necessary, replacement employees, and make said named employees whole for any loss of earnings suffered by reason of our discrimination against them, with interest thereon: Joseph Doyle, Elizabeth Sher, Dave Sanchez, Mort Kohn, Kenneth Light, Ernest Posey, Julie Roman, Paul Pratchenko, Louise Stanley, Jack Stone, Tom Wojak, Marion Swetschinski, Karl Cohen and William Cutchins.

STEPHENS INSTITUTE, d/b/a
ACADEMY OF ART COLLEGE
(Employer)

By .....
(Representative) (Title)

Dated .....

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone Number: (415) 556-0335.

Appendix 2

241 NLRB No. 133

FPT
D—4925
San Francisco, Calif.

United States of America
Before the National Labor Relations Board

Case 20—CA—13740

STEPHENS INSTITUTE, d/b/a
ACADEMY OF ART COLLEGE

and

CALIFORNIA FEDERATION OF ART
TEACHERS, LOCAL NO. ONE

DECISION AND ORDER

On December 28, 1978, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party and counsel for the General Counsel submitted as their briefs to the Board their briefs to the Administrative Law Judge.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has de-

cided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Stephens Institute, d/b/a Academy of Art College, San Francisco, California, its officers, agents, suc-

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1. Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. Cir. 1951) We have carefully examined the record and find no basis for reversing his findings.

In his Decision, the Administrative Law Judge inadvertently refers to Respondent's certified public accountant as George Peck; we hereby correct the spelling of his name to Beck.

2. Respondent contends that it does not fall within the discretionary jurisdictional standard established by the Board for private schools. The Administrative Law Judge found to the contrary, basing his conclusion on two grounds; *viz:* data from Respondent's financial records and a stipulation Respondent entered into in a prior related Board proceeding in Cases 20—CA—12367, 20—CA—12422, and 20—CA—13369 reported at 241 NLRB No. 71 (1979), in which it admitted facts bringing it within the Board's statutory and discretionary jurisdictional amount standards. Respondent argues in the instant case, as it did in the prior proceeding, that the Board is not entitled to rely on this stipulation in order to find jurisdiction. In addition, Respondent contends that there is no independent proof that its gross revenue for an applicable period meets the Board's discretionary jurisdictional amount for private schools and colleges. In rejecting Respondent's contentions on this issue, we rely both on the reasons stated by the Administrative Law Judge and by us in our decision in the prior proceeding (which had not issued at the time the Administrative Law Judge rendered his Decision in the instant case).

cessors, and assigns, shall take the action set forth in the said recommended Order.

Dated Washington, D.C. April 13, 1979

.....

John H. Fanning, Chairman

.....

John A. Penello, Member

.....

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

JD-(SF)-298-78
San Francisco, Calif.

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California

Case No. 20-CA-13740

STEPHENS INSTITUTE, d/b/a ACADEMY OF ART COLLEGE

and

CALIFORNIA FEDERATION OF ART TEACHERS, LOCAL NO. ONE

Alan D. Longman and Richard Baum, Esqs., of San Francisco, Calif., for the General Counsel.

David J. Salniker, Esq., of Berkeley, Calif., for the Charging Party.

Benjamin H. Parkinson, Esq., (*Ackerman, Johnston, Norberg & Parkinson*), of San Francisco, Calif., for the Respondent.

DECISION

Statement of the Case

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed by California Federation of Art Teachers, Local No. One (hereinafter called the Union), on March 21, 1978, against Stephens Institute, d/b/a Academy of Art College (hereinafter called the Respondent), the Regional

Director for Region 20 issued a Complaint and Notice of Hearing on April 28, 1978. The complaint alleged, *inter alia,* that the Respondent terminated the employment of [William] Liam Cutchins on or about December 17, 1977,[1] and denied employment to Joseph Rees and Paul Pratchenko on February 3 and February 13, 1978, respectively, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* The jurisdictional allegations of the complaint contend, in addition to assertions that the Respondent's operation meets the Board's discretionary and statutory jurisdictional requirements, that the instant case "is part of a single overall controversy raised previously in Board Cases Nos. 20-CA-12367, 20-CA-12422 and 20-CA-13369, in which jurisdiction has been asserted." On this basis, the General Counsel argues that continued assertion of jurisdiction is necessary to give "full scope and effect" to the Order in the prior case.[2] The Respondent filed an Answer in which it denied the jurisdictional allegations of the complaint and the commission of any unfair labor practices.

A hearing was held on this matter on August 15, 16, and 17, 1978, in San Francisco, California. All parties were

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1. Unless otherwise indicated, all dates herein refer to the year 1977.

2. The prior proceeding was heard by Administrative Law Judge Russell L. Stevens, and his decision issued on March 28, 1977 [JD-(SF)-63-78]. There was no contention during the hearing in the prior proceeding that the Respondent did not meet the Board's statutory or discretionary jurisdictional requirements, and Judge Stevens concluded, on the basis of the record evidence, that jurisdiction had been established. On appeal to the Board, however, Respondent engaged new counsel who raised the issue of failure to satisfy the Board's discretionary jurisdictional standards as one of the grounds for appeal. The Board has not issued its decision in Judge Stevens' case as of the time of the issuance of this Decision.

represented by counsel who were afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues in controversy. Briefs were submitted by counsel and have been duly considered.

Upon the entire record in this case,[3] and from my observation of the witnesses and their demeanor while testifying, I make the following:

Findings of Fact

I. Jurisdiction

It is admitted, and I find, that the Respondent is a California corporation engaged in the business of operating a private for-profit college, and its principal place of business is located in San Francisco, California. The Respondent contends, however, that its gross revenues for an applicable

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3. The brief for counsel for the General Counsel contained a motion to correct the transcript of the hearing in the following manner:

Page	Line	Transcript	Correction Requested
115	14	course	courses
115	15	course	courses
116	24	seven	seventeen
118	9	Modina	Modena
122	2	Sandford	Sanford
150	1	rank	right
234	10	1978	1977
235	7	November 22	November 28
238	11	was a	was not a
300	9	fell	filled
310	14	needs	meets
374	4	Yates	Haight
436	25	opinion	decision
479	19	Sculpture	Sculptor
485	21	administrator	semester
80	2	$1,527,000.00	$1,005,527.00

This motion is hereby granted.

12-month period does not satisfy the discretionary standard of $1 million established by the Board for its type of business enterprise.[4] This current assertion of lack of jurisdiction is grounded on events that took place during the prior proceeding before Judge Stevens. There, the Respondent and the Union entered into a private written agreement whereby the Respondent agreed to pay certain specified sums and reinstate certain employees alleged to be discriminatees in that consolidated complaint. In addition, the parties agreed to execute a Stipulation for Certification Upon Consent Election providing for the holding of a Board-conducted election. The Union in turn agreed to request the General Counsel to withdraw all allegations from the consolidated complaint relating to the discriminatees set forth in the private settlement agreement. The parties further agreed to execute a Stipulation of Facts, in conjunction with the General Counsel, to be entered into evidence on the balance of the issues raised by that consolidated complaint. The private agreement stated that "[i]t is expressly understood that the aforesaid Stipulation of Facts shall have no force or effect in any other proceeding." The factual stipulation executed by all of the parties, including the General Counsel, recited jurisdictional facts sufficient to satisfy the Board's requirements, and stated that the stipulation was "made for the purpose of these proceedings." The parties also executed the Stipulation for Certification Upon Consent Election agreement, ap-

4. At the outset of the hearing, the Respondent also denied it purchased goods, materials, and supplies valued in excess of $5,000 directly from suppliers located outside the State of California. During the course of the General Counsel's proof on this issue, laboriously gleaned from the Respondent's own records, the Respondent conceded this point and admitted to out-of-state purchases in excess of $5,000. Therefore, statutory jurisdiction is not controverted here.

proved by the Regional Director, reciting facts necessary to sustain the Board's assertion of jurisdiction.[5]

An all-party informal Board settlement agreement, approved by the Regional Director, was executed prior to the hearing before Judge Stevens. (General Counsel's Exhibit No. 25). At the hearing, the General Counsel was permitted to strike the allegations relating to the alleged discriminatees cited in the settlement agreement, and trial proceeded on the remaining issues presented by the consolidated complaint. Subsequent to the close of that hearing, the Regional Director withdrew her approval of the informal settlement agreement on the ground that the Respondent had failed to comply with its terms. (General Counsel's Exhibit No. 27). The hearing was reopened, and the withdrawn allegations were reinstated and tried before Judge Stevens. At no time during the reopening did the Respondent contend that the factual stipulations on jurisdiction were invalidated by the withdrawal of approval of the informal settlement agreement and therefore without force and effect. Indeed, on the basis of the stipulations, Judge Stevens concluded there was jurisdiction. It was not until the Respondent appealed Judge Stevens' decision to the Board through new counsel that the issue of jurisdiction was raised.

In light of these facts, I find that the Respondent cannot now attempt to rescind the validity of its factual admissions in the prior proceeding and assert that reliance on these admissions is not proper to sustain jurisdiction in the instant case. The Board has repeatedly held that while a question concerning its statutory jurisdiction may be raised at any time, the issue of assertion of jurisdiction under the

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5. The above documents were entered into evidence in the prior proceeding and were reintroduced in the instant case. (General Counsel's Exhibit No. 26).

Board's discretionary standards must be timely presented. *Anchortank, Inc.*, 233 NLRB No. 52, n. 1 (1978); *Travel Rest, Inc., d/b/a Gateway Motor Lodge*, 224 NLRB 851 (1976); *Pollack Electric Co., Inc.*, 214 NLRB 970, n. 4 (1974). While it is true that most of the cases involving the untimely raising of the issue of application of the discretionary jurisdictional standards usually occur where the parties have participated in a representation proceeding in which jurisdiction is not contested, and then seek to raise the issue when confronted with a subsequent unfair labor practice proceeding, the underlying principle still applies. Having admitted or conceded in a prior Board proceeding that jurisdiction attaches, the Respondent cannot successfully contend, absent a strong showing of changed circumstances or error, neither of which obtains in the instant case, that the Board's discretionary jurisdictional standards have not been satisfied. This is especially true where, as here, the events alleged to be unlawful in the subsequent proceeding occurred during or shortly after the prior proceedings in which Board jurisdiction was admitted.

But even if I were to find that the Respondent could now raise the issue of the Board's discretionary jurisdiction, I would, nevertheless, find that these standards have been met in the instant case. Counsel for the General Counsel subpenaed the Respondent's books of original entry and records relating to its financial accounts as well as its latest U.S. income tax return.[6] The Respondent's certified public accountant, George Peck, was called as a witness to explain the entries on these documents. Although the Respondent's fiscal year for tax purposes ended on August 31, Peck submitted a summary showing that the Respondent had a net

6. The Respondent's fiscal year for tax purposes is from September 1 to the following August 31.

tuition income for the calendar year 1977 in the amount of $998,255.11. (Respondent's Exhibit No. 1). In addition to this amount, examination of the Respondent's income tax return from the fiscal year 1976-1977 and its miscellaneous income ledgers reveal that the Respondent also received $13,050 as rental income and in excess of $24,000 as interest income during the year 1977.[7] Since the Board's jurisdictional standards for private educational institutions operating for a profit require a gross revenue from *all* sources, excluding contributions not available for operating expenses because of limitations by the grantor, to be not less than $1 million, it is evident from the Respondent's own records that its gross annual revenue for the year 1977 exceeds the amount necessary for assertion of jurisdiction.[8] The Respondent contends that the calendar year 1977 is not an appropriate period for calculating its gross revenue, and the 12- month period immediately preceding the filing of the charge is the only timespan that can be considered. This argument is without merit since the earliest unfair labor practice in the complaint is alleged to have occurred in December 1977. Moreover, since this case follows immediately on the heels of a prior proceeding involving the Respondent and the same alleged discriminatees, it is evident that the calendar year 1977 is appropriate for purposes of determining whether the Board's discretionary juris-

7. General Counsel's Exhibit Nos. 3 and 4.

8. Counsel for the General Counsel also argues that the value of the tuition which the Respondent would have received from students engaged in work-studies programs must be included as tuition income. I find it unnecessary to include these amounts as the Respondent's records show, without consideration of revenue from this source, that the Respondent clearly exceeds the Board's jurisdictional standards for its type of operation. Moreover, the precise number of students engaged in the work-study programs is not clear in the record, and any attempt to calculate the value of their tuitions would be based on speculation.

dictional requirements have been met. Cf. *Poor Richard's Pub,* 217 NLRB 102 (1975).

On the basis of the above, I find that the Respondent meets the Board's statutory and discretionary jurisdictional standards applicable to its operation. Thus, I find that the Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.[9]

II. The Labor Organization Involved

Although the Respondent's Answer denied that the Union was a labor organization within the meaning of the Act, the parties subsequently stipulated at the hearing that the Union was in fact a labor organization. Accordingly, I find that California Federation of Art Teachers, Local No. One (CFAT) is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. [*William*] *Liam Cutchins*

Cutchins was an instructor in the Respondent's photography department. In the prior proceeding before Judge Stevens, Cutchins was found to be unlawfully denied employment from September 1 to September 15 (the beginning of the 1977 fall semester) in retaliation for his strike activities and support of CFAT.[10] The evidence in the

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9. Counsel for the Charging Party argues that the Respondent's claim of lack of jurisdiction was asserted in "bad faith," and requests attorney's fees and costs. I do not find that the Respondent's defense was asserted in bad faith nor do I find that it was frivolous or lacking some color of right. Therefore, the motion of counsel for the Charging Party is hereby denied.

10. JD-(SF)-63-78, pp. 36-38.

instant case discloses that Cutchins was restored to his teaching assignments pursuant to the terms of the private settlement agreement executed by the parties. Cutchins was assigned to teach one photography appreciation class, the Brooks Clinic,[11] and was supposed to assume duties as a technician in the photo laboratory.

The record indicates that Cutchins was restored to all the agreed-upon assignments except that of laboratory technician. Shortly after his return in mid-September, Cutchins questioned John Yates, director of the photography department, about the failure to assign him the laboratory responsibilities as agreed upon in the settlement between the Union and the Respondent. According to Cutchins' unrefuted testimony, Yates replied, "I don't care what you have been promised by the administration, the government, or anybody else. I am running this department and I will do it my way."

In early October, the exact date is not clear in the record, Cutchins had a chance meeting in the Respondent's Sutter Street building with Will Mosgrove, president of the newly-formed Student Senate. Mosgrove told Cutchins that the student organization was going to hold a meeting that afternoon. He told Cutchins that it would be an open meeting and extended an invitation for him to attend. Cutchins went to the meeting and observed that nine of the students attending were from the photography department. According to Cutchins, they expressed concern about funding a Halloween dance through various means, such as a "design-

11. The Brooks Clinic was part of a commercial arrangement between Brooks Camera Stores and the Respondent. This arrangement allowed purchasers of $100 or more of camera equipment from Brooks to take non-credited photography classes at the Respondent's school at certain specified times. The Respondent was to furnish the instructors for the classes from its faculty. In return for this service, Brooks permitted the Respondent to charge $100 worth of photography equipment per class session.

a-T-shirt" contest and rental of locker space. While the meeting was in progress, Mosgrove asked Cutchins if he wished to add anything to the discussion. Cutchins told the students there was a possibility they might want to concern themselves with some other matters which he felt were more relevant. One of the matters he mentioned was the fact that 20 percent of the available classes had been cancelled that semester because they "had not filled." He stated that approximatley 98 percent of the cancelled classes belonged to former union members, and suggested that the students "might want to clear the air by calling for an investigation of [the Respondent's] enrollment procedures." Cutchins testified that as the meeting was breaking up, a question was directed to him concerning the accreditation of the Academy.[12] Cutchins' response indicated that he was not certain, but thought that the Respondent received its accreditation through its joint program with the University of San Francisco (USF). He went on to state, that as far as he knew, he was the only "credentialed" member in the entire photography department.[13]

On October 18, Donald Haight, Respondent's vice president and Registrar, sent a letter to Cutchins expressing concern over his statements to the student group. Haight, as

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12. The record of the prior case indicates that accreditation was one of the problems concerning the student body during the time that the dispute arose between the Union and the Respondent. (General Counsel's Exhibit No. 32).

13. Cutchins was referring to the California Community College teaching credential. The joint program offered by the Respondent and USF allowed the students to earn a Bachelor of Fine Arts degree from USF. To assure full accreditation for the program, John Iglesias, the USF coordinator, wrote to Cutchins and presumably to other instructors at the Academy, stating that they should possess the teaching credential or a Master of Fine Arts degree or submit satisfactory documentation of their work experience in the art field. (General Counsel's Exhibit No. 30).

vice president, was the chief operating official at the Academy responsible for its day-to-day operation. In the letter Haight asked Cutchins to arrange a meeting with him and Yates to discuss the matter. In response to this request, Cutchins scheduled a meeting on October 26 in Yates' office. At the appointed time, Cutchins met with Haight but Yates failed to attend. Haight took notes during the course of the meeting. According to Cutchins, Haight expressed disapproval of the statements Cutchins made to the student group. Cutchins replied that he had simply meant to clear the air on the enrollment procedures. Cutchins also informed Haight of the Respondent's failure to pay him $60 per class for the Brooks Clinic courses and to assign him the duties of laboratory technician as called for in the private settlement agreement. Cutchins testified that Haight also expressed concern over the fact that the laboratory job had not been assigned to him.

Following the meeting, Haight had his notes typed and sent a copy to Cutchins in the form of a letter. The notes purported to set forth the discussion that occurred during the meeting, and he invited Cutchins to contact him concerning their accuracy. (General Counsel's Exhibit No. 20). On October 31, Cutchins sent a copy of the typed notes back to Haight with indicated amplifications and corrections. By and large, however, Cutchins agreed with Haight's version of his comments to the students. (General Counsel's Exhibit No. 21). Haight testified that he sent a typed copy of his handwritten notes to Yates on October 26—the day of the meeting with Cutchins. He stated that the notes were forwarded with a cover letter addressed to Yates. Haight also testified that he had no subsequent discussion with Yates concerning the notes. The cover letter was introduced into evidence (Charging Party's Exhibit No. 1), and ex-

amination of it reveals no reference to the notes. It contained a mild admonishment of Yates for failing to attend the meeting and a request that Yates see Haight concerning the lab technician's job which was to be assigned to Cutchins. Yates, on the other hand, testified that he received a copy of Haight's original notes and Cutchins' corrected version along with a cover note from Haight. According to Yates, the cover note from Haight simply stated, "Please look into this." Yates testified that after receiving the material, he discussed the contents with Haight.

Yates testified that shortly after he received the material regarding Cutchins from Haight, he contacted Casey Fitz-Simons, chairman of the Faculty Senate. He directed Fitz-Simons to write and deliver to him two undated letters, one addressed to Cutchins and the other to Peter Ogden, another instructor, advising them that a faculty review committee would be convened to evaluate their teaching performance.[14] According to the testimony of Yates, he had been informed by Mosgrove that Cutchins was attempting to involve the students in the Union's controversy with the school. According to Yates, Mosgrove spoke with him shortly after Cutchins met with the student group. He also testified that on a number of occasions various students, whose names he was unable to recall, questioned him about the conduct of Cutchins. He stated that the students wanted to know what was wrong with Cutchins, and "will he be teaching here next semester?" He admitted that it was nothing "completely tangible." He also stated that Cutchins was giving the students instructions which conflicted with that given by other instructors. For these reasons, according to Yates, he wanted to have the letter initiating an

14. Yates' problems with Ogden were unrelated to the issues involved in the controversy with Cutchens.

evaluation by a faculty review committee in the event that he needed to use it at some future date.

It should be noted at this point, that the faculty senate was found by Judge Stevens in the prior case to be a labor organization dominated and assisted by the Respondent. The procedures authorizing and governing the evaluation of the teaching performance of instructors was set forth in a document entitled "Commitment" regulating the terms of employment and working conditions between the Respondent and the faculty.[15]

On November 23, Yates left a note in Cutchins' box at the academy asking that he stop by Yates' office. When Cutchins did so, however, he and Yates were unable to talk because Cutchins was in the middle of a teaching session. On November 28, Cutchins contacted Yates at home, and was asked if he had received "the letter." When he inquired as to what letter, Yates told him that he would know when he received it. The following day, Yates again inquired if Cutchins had received the letter. After Cutchins questioned him about the substance of the letter, Yates stated that it was to notify Cutchins to appear before a faculty review committee for evaluation on December 1. Yates told Cutchins to select a permanent faculty member to serve as a representative on the committee. Cutchins questioned the need for an evaluation, since all of the reports from his students on his teaching performance were favorable. Yates replied that he had a list of complaints from Haight, and that Cutchins would have to appear before the committee. Cutchins then selected Michael Dumont, another instructor in the photography department, as his choice for a representative to sit on the review committee. Cutchins subsequently contacted Dumont, who reluctantly agreed to serve. Dumont's reluctance was

15. General Counsel's Exhibit No. 28, section 6.

due to demands on his available time, as he had outside commitments in addition to his teaching duties.

The morning of December 1, Yates called Cutchins to notify him of a change in the time for the evaluation meeting. He also suggested that Cutchins select someone other than Dumont because of the limited amount of time Dumont had available. Cutchins insisted on Dumont as his choice, and asked who Yates had selected. Yates replied that he had chosen Michael Woods, director of the fine arts department, as his designee to sit on the review committee. Cutchins protested on the ground that Woods was a member of the faculty senate which was a rival to the Union. He stated that Woods would be unsympathetic to any matters involving him. However, Yates refused to change his selection.

When Cutchins went to the academy to appear before the review committee, he checked his box and discovered the letter previously referred to by Yates. Although this letter was given to Yates by FitzSimons in undated form in October, it now contained the date of November 23.

Cutchins met with the evaluation committee, which consisted of Dumont, Woods, and Yates, at the rescheduled time. Yates acted as chairman of the committee. He stated that the teaching abilities of Cutchins were not being called into question, and noted that Cutchins was a very capable instructor. Cutchins then questioned the purpose of the evaluation, since the letter from FitzSimons stated that his teaching performance would be under review. Yates produced the correspondence between Haight and Cutchins relating to the instructor's statements to the student group in October and informed Cutchins that his "attiude" was in question. According to the testimony of Cutchins, Yates stated that he (Cutchins) was a "dinosaur" at the academy,

and "a relic from another time." He told Cutchins that "your union friends aren't here anymore and we are the faculty senate and we are running things." Cutchins was questioned as to why he attended the student meeting and why he made the statements which he acknowledged in his discussions with Haight. During the course of the interview, Woods referred to Cutchins as the last of the union people at the school.[16] According to the testimony, Yates and Woods wanted to know if Cutchins would exert sufficient control over his actions so as not to involve the students in his battle with the school administration. Cutchins replied that he would not lie to his students, and Woods asked if he were trying to be a "Joan of Arc." Woods suggested that he was not asking Cutchins to lie to his students, but to exercise some "discretion" in making remarks to the students.

According to the testimony of Cutchins, Yates asked if he had considered applying for a position at another college. Yates suggested that he would be willing to write a favorable letter of recommendation for Cutchins and would not mention his "politics."[17] Yates also asked Cutchins how he felt about Haight. Cutchins indicated he did not like or respect Haight, but did not feel that it was necessary to do so in order to perform his job. Nor did he think his feelings toward Haight impaired his teaching ability. Yates then stated that if Cutchins remained at the school the following

16. Although Dumont had testified that the evaluation session did not involve Cutchins' union associations, his affidavit contained statements to the contrary. There Dumont stated he felt "the decision had already been made to get rid of Cutchins and that there was a certain hostility toward Cutchins because of his association with the union people." (General Counsel's Exhibit No. 29).

17. The testimony of Dumont indicated that Cutchins' "politics" was frequently brought up during the course of the evaluation discussion.

semester, it would create more work for him because Cutchins would not be able to deal correctly with Haight and Yates would have to be the "go-between." The testimony of all indicates that the panel was seeking to get some assurance from Cutchins that he would not discuss matters involving the Union or the union supporters with his students. Questions were also put to Cutchins regarding his statements that he was the only credentialed member of the photography departemnt. Cutchins explained that he was referring to the Community College teaching credential mentioned in the Iglesias letter to the faculty. At the conclusion of the meeting, Cutchins was informed that the panel would notify him of its decision.

Several days later, Dumont, Yates and Woods met to give further consideration to Cutchins' evaluation. During the course of their discussions. Dumont recounted an incident that occurred in October, when he met Cutchins with a group of students after a visit to a gallery. They were in a bar and Cutchins told the students the school was only interested in money. Cutchins made statements which were critical of the lifestyle of the Respondent's president, and he also stated that he was the only credentialed instructor in his department. The three review committee members unanimously decided to recommend that Cutchins' services as an instructor be terminated at the end of the current semester. Dumont testified he felt it was indiscreet for Cutchins to discuss his union affiliation or his disagreements with the school administration with his students. Yates testified that he was very much concerned about Cutchins lobbying students on behalf of the Union in the dispute with the Respondent. He was equally concerned that Cutchins gave the students the impression Haight manipulated the enrollment procedures in order to get rid of the instructors who were members of or sympathetic to the Union.

On December 5, after having placed several calls to Yates, Cutchins was contacted by Yates at home. Cutchins wanted to know if the evaluation committee had reached a decision. Despite the fact that the committee had already decided to recommend Cutchins' termination, Yates replied that the committee needed more information. He told Cutchins that the committee wanted to interview several of his students to determine whether he made disparaging remarks about the school administration on another occasion.[18] Shortly before Christmas, Cutchins received a letter dated December 17, informing him that the committee was unanimous in its recommendation that he not be continued on as an instructor, effective at the conclusion of the current semester. (General Counsel's Exhibit No. 24). Although the letter stated the committee's decision was unanimous, it was only signed by Woods and Yates. Examination of the letter shows that the line on which Dumont's signature would have appeared had been whited out with typewriter correction fluid. Nor did the letter contain signatures of the members of the faculty senate, thereby indicating approval of the recommendation. FitzSimons testified, however, that Yates provided her with a copy of the December 17 letter after the review process had been completed. She then took it to three other faculty senate members to get their signatures of approval. A copy of this letter was introduced into evidence by the Respondent, but there was no explanation as to why the approved letter was not forwarded to Cutchins.

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18. Dumont's affidavit indicates he "sensed" that Woods and Yates delayed notifying Cutchins of the committee's decision in order to prevent him from discussing it with students. In contrast to this delay, Ogden, the other instructor under review, was notified in writing on December 5 that the committee was recommending termination of his services.

On January 3, 1978, the review committee submitted a written report to the faculty senate setting forth its actions and deliberations regarding the review of Cutchins and Ogden. (Respondent's Exhibit No. 4). With regard to Cutchins, the committee stated that it felt "it would be difficult if not impossible for Mr. Cutchins to continue teaching without voicing to his students his dissatisfaction with the college and the administration." The report went on to state that "Cutchins' attitude toward his fellow instructors and the college in general is so strongly negative that it would almost certainly be detrimental to any future teaching endeavors."

Cutchins testified that he contacted Yates on February 6, 1978, the first day of the spring semester. He told Yates that he was ready to work. He also stated that he had not received a letter of termination from the Respondent. Yates replied that the letter of December 17 was a termination letter and had been sent with the full authority of the faculty senate. Cutchins requested a formal termination notice and a letter of recommendation, which Yates had promised during the evaluation session. At the time of the hearing, Cutchins had received neither of these documents from the Respondent.

B. *The Cancellation of the Classes to be Taught by Joseph Rees and Paul Pratchenko During the 1978 Spring Semester*

Paul Pratchenko had been an instructor at the Respondent's school for a number of years. He had been an active supporter of the Union and participated in the strike in 1977. Pursuant to the private settlement agreement between the Respondent and Union, Pratchenko had been restored to his teaching duties during the 1977 fall semester.

During the 1978 spring semester, Pratchenko was scheduled to teach a class in intermediate figure-drawing. He was considered a highly qualified instructor, and in prior semesters had taught courses in basic painting, basic figure-drawing, and intermediate and advanced painting. Registration for the 1978 spring semester started on November 28 of the prior year and ended February 4, 1978. Late registration was permitted from February 5 to February 17, 1978. However, the evidence indicates that a few students were permitted to register, in what Haight described as certain studio courses working with models, as late as April and May.[19]

Haight testified that he and his assistant, Jan Schroeder, registered each student. In the process of registration, they went over the student's proposed course schedule and determined whether the prerequisites had been met for the courses selected. According to Haight, neither he nor Schroeder counseled any of the students already enrolled at the academy, since they would have cleared their course schedule with their department heads. He stated they only counseled new students who did not have an opportunity to meet with the department heads, and this counseling was limited to the basic course selection. He testified that it was the exclusive province of the department heads to advise students on the substantive content of the courses and to be thoroughly familiar with the capabilities of the instructors assigned to teach them. This differs substantially from

19. It was the practice, according to Haight, to limit late registration, with the exception of the studio courses, to enrollment in classes which had not met more than once at the time of the student's registration. Thus, during the week of February 5, a student could enroll in a class only if that class had not met more than once. Likewise, during the following week of late registration, the student would be permitted only to enroll in a class which was meeting for its first or second session.

the testimony given by Haight in the prior proceeding regarding his duties in counseling the students during registration. There, Haight testified he had substantive knowledge of the courses and the requirements the students had to follow, and was very familiar with the instructors teaching the courses.

At the beginning of the spring semester, February 3, 1978, eight students were enrolled in Pratchenko's intermediate figure-drawing class. Thus, the class was two students below the minimum requirements established by the Commitment.[20] Haight and Woods testified that they attended a meeting with Stephens on February 3, 1978, along with the other department heads. The purpose of the meeting was to determine which classes would be cancelled because of low enrollment. According to Haight, he supplied a current tally of the enrollment of all of the classes to Stephens and the department heads. Haight testified that he played no role in the ultimate decision of class cancellation. However, he also testified he felt, based on his 5 years experience as Registrar, that there was a possibility the enrollment in Pratchenko's class would increase before the end of late registration. He stated it was on the basis of this belief that Stephens and Woods decided not to cancel Pratchenko's intermediate figure-drawing class on February 3. Woods, on the other hand, testified that Stephens asked if Pratchenko's class should be continued. Woods stated he recommended that the class be cancelled because it failed to meet the minimum enrollment. Moreover, as a

20. Under the terms of the Commitment negotiated between the Respondent and the faculty senate certain minimums were established for various categories of classes. Eight students constituted the minimum for sculpture and print-making classes, fifteen students for foundation classes, and ten students for all other classes. Failure to achieve the prescribed minimum, however, did not automatically require cancellation of the particular class.

small class it would not make any money for the Respondent. He also stated that other scheduled courses which had achieved the minimum enrollments would provide the same instruction that the students would receive from Pratchenko's intermediate figure-drawing class. Woods testified that he told Stephens he chose not to exercise his option to continue the class because it "was not an integral part" of his department.[21] Woods stated he made no affirmative decision to cancel, but merely chose not to exercise his option to continue the class. He testified that the final decision rested with Stephens.

Although Haight testified he played no active role in the decision to cancel Pratchenko's class, he sent a letter to Pratchenko on February 13, 1978, 4 days prior to the end of late registration, notifying him that his class had been cancelled. (General Counsel's Exhibit No. 11). Haight stated this action was based on his sense of the discussion between Woods and Stephens on February 3. The cancellation letter indicated that the course was kept open the first week of classes in the belief it would fill by students registering late, but it did not meet "the required minimums as defined in the . . . Commitment." The letter concluded by telling Pratchenko to contact his department director, if he wished to be considered for a possible future teaching position at the Academy.[22]

Having sent the cancellation notice, Haight had Woods attend the second session of Pratchenko's class on February 17, the last day of late registration. Woods taught the class for that session, and he and Haight transferred

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21. According to Woods, a department head could elect to continue an under-enrolled class, if he felt it was necessary to the program offered by his department.

22. Pratchenko's class was the only class cancelled after February 3, 1978.

the students to other figure-drawing classes for the remainder of the semester. The Respondent did not offer Pratchenko any classes for the following summer or fall semesters. Both Haight and Woods testified that Pratchenko never contacted Woods, as department director, to indicate that he desired to continue teaching at the school. Haight and Woods admitted, however, that they were aware of the charges that had been filed on behalf of Pratchenko and Rees by the Union in March 1978, and that these employees were seeking reinstatement to their former jobs.

As in the case of Pratchenko, Joseph Rees had been employed by the Respondent for several years and was an active supporter of the Union in its dispute with the Respondent. Rees was an instructor in the sculpture department who taught several courses, and he was the only instructor who taught neon sculpture prior to the 1978 spring semester. The records indicate that he averaged 17 students per class in basic sculpture over a three-semester period and 15 students per class in neon sculpture over a seven-semester period. Rees had been chairman of the sculpture department at one time, and was the most senior sculpture instructor in terms of length of service with the Respondent.

On February 3, 1978, seven students were enrolled in Rees' basic sculpture class and seven were enrolled in his neon sculpture class. At the meeting between Stephens, Haight and the department directors on February 3, a decision was made to cancel both of Rees' sculpture classes, even though it meant cancelling 50 percent of the sculpture courses offered by the Respondent during the spring semester. In each instance, Rees' sculpture courses had an enrollment one below the minimum set by the Commitment.

Haight testified that he played no active role in the cancellation of Rees' classes, and that the decision was made by Stephens and Woods. However, Haight further testified he did not feel there was any likelihood that the enrollment for Rees' courses would reach or exceed the minimum requirements. He also stated that Woods indicated the sculpture courses were not "a significant part of his curriculum to the point where he felt he needed it to maintain the level of instruction in his department."

Woods, on the other hand, testified that the decision to cancel Rees' classes was made by Stephens. Again, he stated that he merely refused to exercise his option to retain Rees' classes as being necessary to the integrity and quality of the program offered by his department. Woods also testified that his decision [not to exercise his option] was based in part on complaints he had received from students. According to Woods, the students complained that Rees taught the basic sculpture class at a level above that for which it was intended, and seemed to have "an ax to grind." Woods also testified that Rees did not relate to him, as department director, by refusing to follow established procedures in processing his purchase orders.[23]

As in the case of Pratchenko, the Respondent did not offer any subsequent teaching opportunities to Rees during the following summer and fall semesters. Both Haight and Woods stated that Rees failed to contact Woods to indicate his availability. The record indicates that neon sculpture was offered as a course by the Respondent the following

23. Although Woods admitted that these complaints existed during the prior semester, he nevertheless scheduled Rees for the two sculpture courses during the 1978 spring semester. Woods also acknowledged that the neon sculpture course taught by Rees was unique, and there was no similar offering made by the sculpture department.

summer semester. Christian Schiess, a former student at the academy who studied scupture under Rees, was hired by the Respondent to give the course. Haight testified that he did not know Schiess professionally, but acknowledged that the first time Schiess had ever taught neon sculpture was during the Respondent's 1978 summer session. Evidence was introduced, however, showing that Haight had written a letter of recomendation for Schiess for admission to a graduate program for a Masters Degree in Fine Arts. Haight extolled Schiess' ability and talents in this letter. The record further indicates that neon sculpture was offered during the 1978 fall session, and the course was taught by Schiess.

C. *The Practice Followed by the Respondent in Dividing Class Enrollments and Retaining Instructors*

While the Commitment set forth the minimum enrollment levels for the various categories of classes, the Respondent also followed an announced policy of attempting to equalize the class sizes by keeping them at "workable levels." In the school catalog (General Counsel's Exhibit No. 5) workable levels were established as 25-30 students for foundation courses, 15-18 students for intermediate courses, and 9-12 students for advanced major courses. In addition, the Respondent announced in the first edition of its newsletter for the 1977 fall semester that classes which were below minimum enrollments would be retained, if there were "no other similar offerings." (General Counsel's Exhibit No. 10).

Although Haight testified there was no established policy regarding the control of the size of classes, the Respondent's records disclose that during the 1977 fall semester at least 10 classes had their enrollment divided after the return of the striking instructors. Haight testified that he did so in

conjunction with all of the department heads.[24] The net result of this class splitting in the fall semester allowed the Respondent to retain many nonstriking instructors on its payroll, while restoring some of the striking instructors to their duties pursuant to the private settlement agreement. For example, Pratchenko was restored to his duties as an instructor for an intermediate figure-drawing class that had an enrollment of 23 students. Haight divided this class and Farello, a nonstriking instructor, was retained to teach the split-off portion. Haight also testified that the nonstriking instructors for whom classes were not available or whose classes had been cancelled, were rehired by the Respondent to teach classes the following spring semester.

In contrast to the practice followed during the 1977 fall semester, the Respondent did not divide any of the existing figure-drawing classes when the decision was made to cancel Pratchenko's class. Rather, Pratchenko's students were reassigned to existing figure-drawing classes. At the time that the students were transferred, Haight's records indicated that 19 students were enrolled in Farello's intermediate figure-drawing class (1 above the workable level), 22 students were registered in Worthington's intermediate figure-drawing class (4 above the workable level),[25] 38 students were registered in Woods' intermediate figure-drawing class (20 above the workable level),[26] and 38 students

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24. Woods denied playing any role in the class splitting during the 1977 fall semester, although he was director of the fine arts department at the time. No other department director testified on this point.

25. The testimony indicates that Worthington, a nonstriking instructor, had never taught intermediate figure-drawing or intermediate painting at the academy prior to the 1978 spring semester.

26. Woods' class ultimately increased to an enrollment of 40 students.

were registered in FitzSimons' basic figure-drawing class (20 above the workable level).

In addition to dividing the class enrollments in the 1977 fall semester, the Respondent's records indicate that eight classes, which had enrollments below the minimum, were retained. During the 1978 spring semester, three classes with less than minimum enrollments were retained, and these classes were taught by nonstriking teachers. One such class, Advertising Communication II, never achieved an enrollment greater than five students throughout the entire spring semester. Thus, under the terms of the Commitment, this particular class was under-enrolled by five students.

The record also discloses that a small percentage of the students were also assigned to instructors for independent study classes. Haight, on direct examination, testified that he had no way of knowing the number of students who were so assigned. On Cross-examination, after having been shown copies of the instructors' class enrollment books, Haight admitted that students had been assigned to seven different instructors during the 1978 spring semester for independent study classes. However, he stated that his normal practice was to assign the independent study classes to the department directors, since they were salaried employees. By this means he could avoid paying regular classroom teachers for conducting such classes. The Respondent's records, however, indicated that four regular classroom teachers were assigned independent study classes, and none of these teachers had been former strikers or supporters of the Union.

Concluding Findings

In arriving at my conclusions herein, I do not rely on the findings in the decision issued by Judge Stevens in the

prior case involving the same parties. The Respondent has appealed Judge Stevens' decision to the Board and no final disposition has issued in that case as yet. I do take into consideration, however, evidence from the prior case specifically reintroduced in this case as well as record testimony of witnesses, where pointed out and contrasted by counsel with their testimony in the instant case. It is to this extent only that I rely on the record and decision in the case decided by Judge Stevens.[27] The cases cited by counsel for the General Counsel in his brief[28] requesting that official notice be taken of Judge Stevens' decision stand for the proposition that official notice may be taken of a public document. They do not require, however, that my findings be based on other than the record evidence and testimony introduced in this proceeding.

A. *The Termination of [William] Liam Cutchins*

On the basis of the record before me, I find that the facts warrant the conclusion that Cutchins was terminated by the Respondent in violation of the Act. Although the mechanism used to accomplish this was the faculty senate, an organization found by Judge Stevens to be assisted and dominated by the Respondent, I do not rely on these findings in making my determination in the instant case. Rather, it is the total circumstances surrounding Cutchins' termination which lead me to conclude that his discharge was unlawful.

The record discloses that the evaluation of Cutchins by the review committee came about as a direct result of his comments to the student senate group in early October. It

27. *The Duplan Corporation*, 184 NLRB 700, n. 1 (1970), and the cases cited therein.

28. *Airlines Parking, Inc.*, 197 NLRB 762, n. 1 (1972); *Newton Joseph, d/b/a Meat Packers International*, 230 NLRB 222 (1977).

is clear his suggestions to the students (that they concern themselves with the Respondent's enrollment procedures and question the reason why so few union supporters were teaching classes at the academy) caused considerable concern among the Respondent's administrators. Thus, Haight initiated a meeting between himself, Cutchins and Yates, which Yates failed to attend, for the purpose of discussing Cutchins' statements to the students. After the meeting, Haight sent a copy of his notes, as amplified by Cutchins' corrections, to Yates with a directive to "[p]lease look into this." Although Haight denied having played any further role in the evaluation of Cutchins, Yates testified that he had discussed the matter with Haight after receiving the notes. In addition, Cutchins' testimony is unrefuted in the record that Yates informed him that he had to appear before the review committee because of matters brought up in the discussion with Haight. Therefore, it is evident that despite the wording of the letter to Cutchins from the faculty senate, advising him that his performance as a teacher was to be evaluated by the review committee, the sole purpose of the evaluation was to deal with Cutchins' statements to the students and his efforts to involve them in the ongoing labor dispute between the union supporters and the Respondent. Indeed, the unrefuted testimony indicates that at the meeting with the review committee, Yates clearly stated that Cutchins' qualifications as a teacher were not under consideration.

The record further discloses there was considerable animosity directed toward Cutchins by Woods and Yates because of his support for the Union. Cutchins' uncontroverted testimony indicates that Yates referred to him as a "dinosaur" and "a relic from another time," whose union friends were no longer at the school. Although Dumont,

the third member of the review committee, testified there was no mention of Cutchins' union activities, his statements contained in the affidavit given to the Board indicate otherwise. There Dumont stated that Woods referred to Cutchins as the "last of the union people" and wanted to know why he was carrying the battle into the classroom.[29] Thus, it is evident that while the review committee was professing to evaluate Cutchins' conduct for making disparaging remarks about the school and some of its instructors to the student group, it was in fact conducting the evaluation because he was a union supporter and because he had attempted to enlist the support of the student group in the Union's dispute with the Respondent. The anti-union animus as reflected in the statements made by Woods and Yates during the evaluation meeting graphically demonstrate that the review committee was motivated primarily by a desire to remove an ardent union supporter from the Respondent's faculty. Indeed, as Dumont's affidavit indicates, the decision "to get rid of Cutchins" had been made prior to the evaluation interview, and the hostility expressed toward Cutchins was due to "his association with the union people." Inasmuch as the evaluation was initiated by Haight's complaints to Yates regarding Cutchins' conduct, it is reasonable to infer that the Respondent's higher-level officials authorized and sanctioned the entire procedure in order to remove a strong union supporter from its staff. Having found that Cutchins' termination was caused for reasons that were unlawful, the question then becomes whether his comments to the

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29. Dumont impressed me as a witness who was deliberately tailoring his testimony so as to absolve the members of the review committee from any overt consideration of Cutchins' union activities during the evaluation process. His efforts to nullify his prior statements disclosing anti-union hostility by the committee members is unpersuasive. Accordingly, I discredit his testimony where it conflicts with his prior statements in this regard.

student group carried him beyond the protection of the Act and made him unsuitable for continued employment. In my judgment, they did not.

The Board has held, with Supreme Court approval, that where employee activities are detrimental to and disparage the employer's business, it is "not related to the employees' interest as employees," and no longer enjoys the protection of the Act. *Jefferson Standard Broadcasting Company,* 94 NLRB 1507, enfd., *sub nom. Local Union Number 1229, International Brotherhood of Electrical Workers v. N.L. R.B.,* 346 U.S. 464 (1953); *American Arbitration Association, Inc.,* 233 NLRB No. 12 (1977). However, it has been held that where employee statements or comments to third persons relate directly to the labor dispute and are not so opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice the protection of the Act is not forfeited. *American Hospital Association,* 230 NLRB 54 (1977); *Dries & Krump Manufacturing, Inc.,* 221 NLRB 309 (1975), enfd. 544 F.2d 320 (7th Cir. 1976). In my judgment, Cutchins' comments to the student group were not malicious or made in bad faith, nor were they defamatory or disparaging. Indeed, his suggestions to the students related in a general fashion to the very areas of concern expressed in a student-group petition presented to the Respondent during the time of the strike. Furthermore, his statement regarding the fact that he was, to his knowledge, the only "credentialed" instructor in the photography department was not a wide departure from the truth, and was based on a document supplied by the coordinator of the accreditation program with the University of San Francisco. In these circumstances, I find that Cutchins' statements, made to the students who were the ultimate consumers of the serv-

ices offered by the Respondent, were in fact made in furtherance of the ongoing labor dispute and related to the interest of the faculty members who were union supporters. As such, I find that they enjoyed the protection of the Act. *Automobile Club of Michigan,* 231 NLRB No. 99 (1977); *American Cast Iron Pipe Company,* 234 NLRB No. 178 (1977).

In sum, I find that Cutchins did not forfeit the protection of the Act by taking the labor dispute to the student group, and his subsequent discharge by the Respondent through the mechanism of the review committee of the faculty senate was for reasons which violated the rights guaranteed him under the Act. I find this conduct to be in violation of Section 8(a)(1) of the Act. Furthermore, the circumstances here clearly indicate that the Respondent was seeking to discourage its faculty members from maintaining membership in or supporting the Union. For this reason, I also find that the Respondent has violated Section 8(a)(3) of the Act.

B. *The Cancellation of the Classes Assigned to Pratchenko and Rees*

The Respondent asserts that the classes scheduled to be taught by Pratchenko and Rees were cancelled because they failed to meet the minimum standards established by the Commitment. In each instance, however, I find that the facts do not support the Respondent's claim, and these classes were cancelled for reasons which violate the Act.

In the case of Rees, it is evident that he was an instructor of long standing in the sculpture department, and that at least one course which he taught, neon sculpture, was a unique subject matter for which there was no similar offering in the Respondent's program. Although Woods testified at the hearing that the subject was not necessary to the "integrity and quality" of the sculpture department, it is

evident that the Respondent considered it to be otherwise. Hence, the record discloses this particular course was offered the following summer semester and again in the following fall semester. I deem it highly significant that the Respondent failed to offer Rees, a long-standing and proven instructor, the opportunity to teach the subsequent classes, but rather, chose to have a former student of Rees, who was a non-supporter of the Union, to teach the courses. I also deem it highly significant that the Respondent was willing to reduce its sculpture course offering for the 1978 spring semester by 50 percent when it cancelled Rees' basic sculpture and neon sculpture classes.

Equally important to my considerations in this regard is the Respondent's past practice of retaining below-minimum classes, in spite of the Commitment standards, during the 1977 fall semester. There, the Respondent retained eight classes which fell below the minimums established by the Commitment. Significantly, the majority of these particular classes were taught by non-union supporters, thereby enabling the Respondent to retain these instructors on its payroll. Moreover, during the 1978 spring semester, the Respondent continued this practice by retaining three classes which were below minimum. In each instance, the class was taught by a non-union instructor. One such class only had five students enrolled and was five below the minimum standard.

In these circumstances, I find that the facts fully warrant the inference that the Respondent failed to retain Rees' sculpture classes because he was an ardent supporter of the Union and had engaged in the strike activity against the Respondent. My conclusions in this regard are further buttressed by the fact that Woods, as the head of the fine arts department, was willing to offer several other reasons for not retaining Rees' classes, even though the Respondent

officially stated that the failure to achieve minimum enrollment was the sole reason for cancelling. Woods stated that Rees did not relate to him as the department head and that he had complaints from students to the effect that Rees taught the basic sculpture class at a higher level than it was intended. As noted by the General Counsel, these purported complaints were known prior to the 1978 spring semester and yet did not deter the Respondent from scheduling the classes and assigning them to Rees. The fact that Woods was now prepared to offer other reasons for cancelling Rees' classes gives rise to the strong inference that the announced reason was purely pretextual and the underlying motive was unlawful. *The Tompkins-Johnson Co.*, 224 NLRB 31 (1976). The Respondent's claim that it did not offer Rees the opportunity to teach the sculpture classes during the following semester also rings hollow and lacks conviction. The unfair labor practice charge on behalf of Rees and Pratchenko was filed and served on Respondent in March 1978. Thus, it was manifestly clear to the Respondent that the employees were seeking restoration to their positions as instructors at the Academy.

The Respondent admits that the cancellation of Pratchenko's figure-drawing class was caused solely by the fact that it fell below the minimum enrollment. As in the case of Rees, the Respondent again deviated from past practice in deciding to cancel Pratchenko's class. The evidence discloses that during the 1977 fall semester, the Respondent readily divided figure-drawing classes to enable it to retain non-union instructors when the parties agreed to reinstate the striking instructors. On February 13, however, the Respondent elected to cancel Pratchenko's class because it was one below the minimum enrollment. Yet, the Respondent's records reflect that Woods taught an inter-

mediate figure-drawing class with an enrollment of 38 students at the time the decision was made, and this class subsequently increased to 40 students. In addition, several other nonstriking instructors were teaching figure-drawing classes which were far in excess of the workable level set forth in the Respondent's catalog. In view of the Respondent's pronounced and avowed hostility toward instructors who were union members, it is reasonable to infer that the Respondent failed to divide any of the other figure-drawing classes, even though they were far in excess of what was considered to be workable levels, in order to remove Pratchenko from its staff because of his activities on behalf of the Union. Moreover, the evidence discloses that the decision to cancel Pratchenko's class was made *prior* to the second meeting of the class, and was thus contrary to the Respondent's practice of holding classes open until at least the second meeting to determine if there would be any late enrollments. It should also be noted at this point that Pratchenko's class was the only class cancelled after February 3, 1978. The Respondent's professed claim that it was hesitant to divide classes once courses were started is belied by the fact that it did so on a large scale during the preceding fall semester, and also by the fact that it subsequently had to reassign the students who were scheduled to take figure-drawing under Pratchenko.

In sum, I find that the Respondent cancelled Rees' and Pratchenko's classes at the beginning of the 1978 spring semester for the reason that they were supporters of the Union and not because their class enrollment failed to meet the minimum enrollments set by the Commitment. I also find that the Respondent failed to offer these two instructors subsequent teaching assignments because of their activity on behalf of the Union and because the Respondent wanted

to permanently rid itself of all the union supporters. Accordingly, I find that by cancelling the classes of Pratchenko and Rees for these unlawful reasons, the Respondent violated Section 8(a)(1) and (3) of the Act.[30]

Conclusions of Law

1. Respondent, Stephens Institute, d/b/a Academy of Art College, is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By terminating employee [William] Liam Cutchins at the end of the 1977 fall semester for the reason that he engaged in protected activity on behalf of the Union and in order to discourage membership in the Union among the instructors at the Respondent's Academy, the Respondent violated Section 8(a)(1) and (3) of the Act.

3. By cancelling on February 3, 1978, the sculpture classes taught by Joseph Rees and by cancelling on February 13, 1978, the intermediate figure-drawing class taught by Paul Pratchenko, and by refusing to offer these two instructors teaching assignments at the Respondent's school during the following semesters, the Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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30. The General Counsel argues in his brief that the Respondent could have assigned students to Rees and Pratchenko for independent study, thereby retaining these instructors on its payroll. Since the evidence does not indicate how many students were available for independent study in the sculpture or figure-drawing courses, I do not make any findings regarding the failure to assign Rees and Pratchenko this work. In my judgment, to do so would be to rely on speculation.

IV. The Remedy

Having found that the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, the Respondent shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In view of the finding that the Respondent unlawfully terminated the employment of [William] Liam Cutchins and cancelled the classes of Joseph Rees and Paul Pratchenko for the reason that they engaged in protected concerted activity and in order to discourage membership in and activities on behalf of the Union, the Respondent shall be ordered to offer them full and immediate reinstatement to their former positions of employment, discharging if necessary any instructors hired to teach their course subjects since the beginning of the 1978 spring semester, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them. Backpay shall be computed with interest thereon, in the manner prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Florida Steel Corporation,* 231 NLRB No. 117 (1977).[31]

Since the unfair labor practices committed here are of a character striking at the very heart of employee rights guaranteed by the Act, it will also be recommended that the Respondent be required to cease and desist from interfering in any manner with the rights of employees as guaranteed by Section 7 of the Act. *N.L.R.B. v. Entwistle*

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31. See generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

Mfg. Co., 120 F.2d 532, 536 (5th Cir. 1941); *N.L.R.B. v. The Bama Co.*, 353 F.2d 320, 323-324 (5th Cir. 1965); *P. R. Mallory and Co., Inc. v. N.L.R.B.*, 400 F.2d 956, 959-960 (7th Cir. 1968), cert. denied 394 U.S. 918.

On the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[32]

Respondent, Stephens Institute, d/b/a Academy of Art College, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Terminating employees for the reason that they engaged in protected activities on behalf of California Federation of Art Teachers, Local No. One, or any other labor organization, or because they are members of the above-mentioned union, or any other labor organization.

(b) Cancelling classes of instructors and refusing to offer them a future teaching assignment because they are members of the above-named union or any other labor organization.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

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32. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer [William] Liam Cutchins, Joseph Rees, and Paul Pratchenko immediate reistatement to the positions they held as instructors on the Respondent's faculty, discharging if necessary any instructors hired to teach their course subject as of the beginning of the 1978 spring semester and thereafter, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole, in the manner set forth in the section entitled the "Remedy," for any loss of earnings they may have suffered by reason of the unlawful discrimination against them.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary and relevant to analyze and compute the amount of the backpay and reinstatement rights due under this recommended Order.

(c) Post at its San Francisco, California, facility, copies of the attached notice marked "Appendix."[33] Copies of said notice on forms provided by the Regional Director for Region 20, after being duly signed by the Respondent's authorized representative, shall be conspicuously posted by it immediately upon receipt thereof, and maintained for 60 consecutive days thereafter, in places where notices to employees are customarily posted. Reasonable steps shall be

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33. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: DEC 28 1978

GORDON J. MYATT
Gordon J. Myatt
Administrative Law Judge

APPENDIX

Form NLRB-4727
(9-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board Having Found, After a Hearing in Which All Parties Had an Opportunity to Present Evidence, That We Committed Certain Unfair Labor Practices in Violation of the National Labor Relations Act, as Amended, We Hereby Notify You That:

WE WILL NOT terminate employees because they engage in activities protected by Section 7 of the National Labor Relations Act, as amended, and/or because they are members of CALIFORNIA FEDERATION OF ART TEACHERS, LOCAL NO. ONE, or any other labor organization.

WE WILL NOT cancel classes of our instructors and refuse to offer them future teaching assignments because they are members of the above-named union, or any other labor organization, and have engaged in union and/or protected concerted activities on behalf of the above-named union, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the National Labor Relations Act, as amended.

WE WILL offer [William] Liam Cutchins, Joseph Rees, and Paul Pratchenko immediate and full reinstatement to their former positions of employment, discharging if neces-

sary any instructors hired to teach their course subject since the beginning of the 1978 spring semester and thereafter, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them.

STEPHENS INSTITUTE, d/b/a
ACADEMY OF ART COLLEGE
(Employer)

Dated .....

By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,
13018 Federal Bldg.—Box 36047, 450 Golden Gate Ave., San Francisco, California 94102. Telephone Number: (415) 556-0335.

Appendix 3

United States Court of Appeals
for the Ninth Circuit

Nos. 79-7132
79-7215

STEPHENS INSTITUTE, a corporation
d/b/a Academy of Art College,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

CALIFORNIA FEDERATION OF ART TEACHERS, LOCAL NO. ONE,
Intervenor.

Filed—May 5 1980
RICHARD H. DEANE
Clerk US Court of Appeals

OPINION
On Petition for Review and Cross-Application for
Enforcement of an Order of the
National Labor Relations Board

Before: KILKENNY and SCHROEDER, *Circuit Judges* and CAMPBELL, *Senior District Judge**

Argued February 14, 1980
Decided

CAMPBELL, *Senior District Judge:*

In two separate petitions, the Board found that the Stephens Institute (the Academy) had engaged in unfair

*Honorable William J. Campbell, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

labor practices in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* The Board seeks enforcement of its orders issued pursuant to those findings. The Academy challenges the Board's exercise of jurisdiction in both proceedings, and appeals the substantive finding of unfair labor practices in the second proceeding (Case No. 79-7215). We conclude that the Board properly exercised jurisdiction in both proceedings, and grant enforcement of both orders.

The history of this case is one of a long and bitter dispute between the Academy and its instructors. The Academy is a corporation. The principal stockholder and President is Richard A. Stephens. Stephens is also the principal administrative officer, and is responsible for the ultimate decision making. Stephens' principal assistants are Donald Haight, Vice President and Registrar, Jan Schroeder and Michael Ryan. The school employs approximately 58 instructors teaching in various art departments. Most departments have a department chairman, although the responsibilities of department chairmen have never been very clearly defined. Instructors are paid on the basis of the number of classes per week they teach, and only department chairmen receive an annual salary.

In the fall of 1976 approximately 1,100 students were enrolled in the school, about 400 to 450 of which were full time. In mid-November of 1976, a group of students drafted a petition seeking better wages and benefits for faculty members. Upon learning of this petition, Stephens invited Joseph Doyle, co-chairman of the Fine Arts Department, into his office to discuss the demands. Subsequently, a meeting was held which Stephens, Doyle, Paul Pratchenko, the other co-chairman of the Fine Arts Department, Schroeder and several other persons attended. Subsequent meetings

were also held in December, during which the demands for better salary were discussed. During these meetings, Stephens threatened Doyle and Pratchenko with dismissal and on one occasion stated that they "will never teach again" at the Academy. On December 22, 1976, Stephens informed Doyle that he was being offered only one class for the following semester. The reason given was that Doyle's three advanced classes had not filled. At that meeting Doyle blamed the problem of unfilled advanced classes on the registration procedures, and accused Stephens of trying to punish him for union activity. At the time, Doyle was being paid $700 per month for teaching four classes. Shortly thereafter, Doyle called to accept the offer to teach one class, at which time he was informed that the offer had been withdrawn, because he was "hostile toward the Administration."

While these meetings with Stephens were ongoing, Doyle and Pratchenko also met with faculty members to discuss the possibility of organizing a union. In early January of 1977, thirteen faculty members organized the California Federation of Art Teachers, Local No. 1 (the Union). Shortly thereafter, the Union contacted Stephens requesting a meeting. A meeting was held on January 13, 1977 in Stephens' office. Those present included Ernest Posey, business representative for the Union, Joe Rees, a sculpture teacher, and also a member of the Union Negotiating Committee, Elizabeth Sher, also a member of that committee, and David Sokol, the Union's attorney. The Academy was represented by Stephens, Haight, Ryan and two attorneys. At that meeting the Union representatives stated that they were preparing a proposed contract to submit to Stephens for consideration. The proposed contract was submitted on January 17, 1977.

Upon receiving the proposed contract, Stephens began contacting the individual faculty members who had participated in the formation of the Union and offered each of them a separate contract. When faculty members such as Rees indicated a reluctance to sign the contract while negotiations with the Union were ongoing, Stephens responded that he would "just as soon put a lock on the door than accept the Union contract." When instructors declined to sign Stephens' contract, they were handed their letter of resignation to sign. Several Union members signed the Academy's contract, and those that did not sign were dismissed.

As a response to Stephens' actions during January of 1977, the Union members voted unanimously to go on strike. On January 20, 1977, the strike began, and a picket line was formed at the Academy. At about that time Posey went to see Stephens with a letter listing the Union's proposed changes to Stephens' contract, at which point Stephens told Posey that he would fight the Union all the way and close half the school if necessary. Stephens also threatened Posey with physical violence during that meeting.

While the strike was in progress, Stephens approached several of the strikers and offered to pay them higher salaries if they would leave the Union and return to work. No member of the Union accepted Stephens' offer. In late January of 1977 Stephens fired all of the striking instructors. On February 16, 1977, the strikers submitted an unconditional offer to return to work, which was refused.

Apparently in an effort to avoid further labor unrest, Stephens and several of the non-union members organized a "Faculty Senate" in February of 1977. The Administration and the "Faculty Senate" met and established a commitment providing for faculty wages and benefits, faculty

review, faculty leave, hiring and termination of members, grievance procedures, class size and other working conditions.

After members' repeated offers to return to work were declined, the Union filed a complaint with the Board's Regional Office. The complaint charged the Academy with violation of the National Labor Relations Act, Section 8(a)(1), Interference with Union Activity, Section 8(a)(3), Discriminatory Discharge, and 8(a)(5), Refusal to Bargain. The Refusal to Bargain charge was subsequently deleted. The Academy answered the charges by denying any wrongdoing and contending that it lacked the requisite annual gross revenues to become subject to the Board's jurisdiction.

At a hearing commenced before Administrative Law Judge Stevens in August of 1977, counsel for the Board's General Counsel announced that certain issues would be eliminated from the proceeding pursuant to a settlement agreement. The General Counsel added the caveat that the deletion of charges was subject to fulfillment of the terms of the settlement, and without prejudice to reinstate those charges in the event Stephens failed to reinstate the strikers. The settlement was approved, and the hearing then proceeded on the remaining issues, which involved reinstatement and back pay as to six instructors which the Academy considered supervisors.

The settlement agreement provided that sixteen of the strikers would be reinstated with back pay; that the remaining six strikers, whose status was still at issue, would be temporarily reinstated subject to the A.L.J.'s ultimate ruling; that the Union would withdraw its request for a bargaining order; that a recognition election would be held in the Fall of 1977; and that the parties would enter into

stipulations of facts as to service of the charges; the Union's status as a labor organization; the status of certain Academy officials as agents; and the Board's jurisdiction over the Academy.

The stipulation of facts was contained in a separate document from the settlement. While the settlement agreement was approved by the Board's Regional Director, the Board was not a party to the stipulation.

When the settlement agreement was reached in August 1977, the striking instructors were offered an opportunity to return to teach classes in the fall semester. On September 2, 1977, the Friday before all classes were to commence, Registrar Haight checked registration figures for classes which had not filled up to minimum size. While several of the courses with below minimum enrollment were retained, 34 of the classes were cancelled. This resulted in 10 strikers and 1 non-striker losing all of their classes for failure to meet minimum enrollment standards. Evidence was later introduced to show that the Academy filled certain classes taught by non-union instructors by taking students from overly-enrolled classes and placing them in the under- enrolled sections. Evidence was introduced to show that under-enrolled classes taught by Union instructors were not given the full benefit of the late registration period in order to meet minimum enrollment requirements. Also, there was evidence which tended to show that non-union instructors whose classes did not fill were retained and reassigned, while the Union instructors were simply terminated.

As a result of these events, the Union filed new unfair labor practice charges, and the Regional Director withdrew approval of the settlement. Thereupon, the General Counsel for the Board moved to reopen the record, to amend the complaint, and to consolidate the new charges of unfair

labor practices. On November 11, 1977 Administrative Law Judge Stevens granted the motions.

On January 10 and 11, 1978 hearings were held on the reinstated and new charges. At no point during that hearing did either party seek to withdraw any of the stipulations of fact, or the settlement agreement. To the contrary, the Academy's defense to the charges was based on the class size minimum set out in the settlement agreement.

On March 23, 1978, Administrative Law Judge Stevens entered an extensive Order making specific findings as to credibility of witnesses and findings of fact and conclusions of law. He found that the Academy derived gross revenues in excess of one million dollars and purchased goods, materials and supplies valued in excess of five thousand dollars directly from suppliers located outside the State of California. The A.L.J. received no evidence in support of these findings. His conclusion was based solely on the prior stipulation between counsel as to jurisdiction. The A.L.J. found that the Academy had engaged in numerous unfair labor practices by interrogating instructors with regard to Union activity, threatening instructors, refusing to provide contracts to instructors who engaged in Union activity, attempting to interfere with participation in the strike, and finally by terminating the instructors who participated in the strike. In addition to finding that the Academy's actions in early 1978 leading up to the initial termination of Union instructors constituted unfair labor practices, A.L.J. Stevens also found that the subsequent cancellation of classes in September of 1978 and termination of Union instructors who had been rehired constituted unfair labor practices. These findings of the Administrative Law Judge were, in substantial part, adopted by the Board.

The Academy does not appeal the Board's substantive finding of unfair labor practices. The Academy's attack

on that determination is solely jurisdictional. Appellant contends that the dissolution of the settlement agreement vitiates the stipulation to jurisdiction. Absent that stipulation, the Academy contends, there is a failure of proof of jurisdiction in that proceeding.

The second Order of the Board presently on appeal arises out of the termination of photography instructor, William Cutchins, in the fall of 1977, and of Joe Rees and Paul Pratchenko in January 1978 for under-enrolled spring term classes.

Rees and Pratchenko had been reinstated, along with the other strikers, during the fall of 1977. While their classes survived the cancellations of the Fall 1977 term, they were not as fortunate at the beginning of the following term.

William Cutchins participated in the initial strike, and was terminated as a result of that participation. He was subsequently reinstated in August of 1978 pursuant to the settlement agreement between the Academy and the Union. In addition to one teaching assignment, Cutchins was supposed to serve as technician in the photo laboratory. Cutchins' was never assigned to the laboratory technician position by the Director of the Photography Department.

In October 1977, Cutchins was attending a Student Senate Hearing. At the meeting Cutchins suggested that the students might want to concern themselves with the fact that 20% of the fall classes had been cancelled, almost all of which were taught by former strikers. Also, a student asked Cutchins about the school's accreditation. Cutchins responded that he was not sure about the school's accreditation, but that he thought the school was accredited through the University of San Francisco. He also stated that as far as he knew, he was the only member of the Photography Department with teaching credentials. Upon learning of

Cutchins' comments, a Faculty Review Committee was convened to evaluate Cutchins' teaching performance. The committee consisted of Instructor Yates, the head of the Photography Department, Michael Woods, Director of the Fine Arts Department—both non-union instructors—and Cutchins' selection, Michael Dumont, another instructor in the Photography Department. When Cutchins met with the evaluation committee, he was informed that his "attitude" was in question. Cutchins later testified that Yates referred to him as "a dinosaur" and a "relic from another time," and further, that Yates told Cutchins that his "union friends aren't here anymore and we are the Faculty Senate and we are running things." Cutchins was subsequently dismissed for making critical remarks about the Academy to its students.

A.L.J. Myatt held a hearing on charges arising out of these dismissals on August 15, 1978. At that hearing the Union introduced evidence of the Academy's gross receipts for 1977, as well as testimony recounting the events which led to Cutchins' dismissal.

A.L.J. Myatt entered specific findings of fact and conclusions of law on December 28, 1978. He recited the circumstances surrounding the prior admission as to jurisdiction, and concluded that the Respondent could not attempt to rescind the validity of that admission in the subsequent proceeding. He found that the Respondent could not contend that the jurisdictional standards were not met absent a showing of changed circumstances since the prior proceeding. He went on to find, however, that irrespective of the prior admission, the jurisdictional standards had been met. The A.L.J. specifically relied on the testimony of the Academy's Certified Public Accountant who stated that net tuition income for the year 1977 had been $998,000 and

that Appellant had also received $13,000 in rental income and $24,000 in interest income during the year. After finding that the Board's jurisdictional standards had been met, the A.L.J. went on to find that Instructors Cutchins, Rees and Pratchenko had all been terminated as a result of their Union activity, in violation of the Act. That finding was adopted by the Board. The Academy appeals from the Board's finding that these discharges were motivated by union activity, and contends that the A.L.J. committed reversible error by relying on the prior stipulations to jurisdiction in the latter case.

The Academy's argument that the stipulation to jurisdiction was vitiated is a mixture of general equity and principles of contract law. The Academy contends that the settlement agrement and the stipulation of facts, while separate documents, are part of one transaction. If one part of the transaction—the settlement—is set aside, the entire transaction—including the stipulations—must also be set aside. In support of that proposition the Academy relies on cases which hold that it is inequitable for a party to withdraw his burdens under a contract or stipulation without forfeiting the benefits derived under that agreement. *See e.g. Stoffela v. Nugent,* 217 U.S. 499, 30 S.Ct. 600 (1910), and *A & A Sign Company v. Maughan,* 419 F.2d 1152 (9th Cir. 1969).

This argument is defective in several respects. The most obvious problem with this argument is that the Academy is hardly in a position to invoke equity considerations. It was the Academy's conduct which jeopardized the viability of the settlement. Having failed to honor the fundamental terms of the agreement, appellant will not be heard to complain of the alleged injustices which flow from its own breach. Yet, there is a more fundamental problem with

the Academy's position. The reopening of charges before the Administrative Law Judge did not, and could not, affect those facts which were already in evidence in the case. Whether those facts were adduced by stipulation, testimony or documentary evidence, they are part of the record in the case. The reopening of the proceeding, in accordance with the terms of the settlement agreement, does not nullify the stipulation to jurisdiction. In addition, the Academy's defense at the hearing did not call into question the existing stipulation. At no point did the Academy seek to withdraw from the stipulation. Rather, appellant simply argued that it had cancelled the classes pursuant to the minimum enrollment provisions of the settlement agreement.[1] We cannot accept the Academy's assertion that either equity or general principles of contract law require this Court to set aside a stipulation which was freely entered into, never withdrawn, and is part of the record in the case.

Appellant's position with respect to jurisdiction in the second proceeding is equally unpersuasive. While Administrative Law Judge Myatt considered the stipulation in the prior proceeding, he also based his finding of jurisdiction on evidence of gross receipts for the year in question. The testimony of the Academy's accountant relating to gross receipts provides ample evidence to support the A.L.J.'s finding of jurisdiction.

The Academy's appeal of the findings of unfair labor practices is limited to the discharge of William Cutchins in the Fall of 1977, and of Rees and Pratchenko in January 1978. The Academy contends Cutchins was terminated for disparaging his employer, rather than for his union associa-

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1. Appellant raised this jurisdictional objection before the Board. Thus, the Academy is not precluded from raising it again in this Court. See NLRA § 10(e), 29 U.S.C. § 160(e).

tion. With respect to Rees and Pratchenko, the Academy contends that their discharge was based solely on minimum registration levels. Administrative Law Judge Myatt concluded that Cutchins was terminated because he made remarks to a student group regarding the ongoing labor dispute. The A.L.J. concluded that this was in violation of Sections 8(a)(1) and 8(a)(3) of the Act. He reached the same conclusion regarding Rees and Pratchenko, based on his finding that these discharges were a result of their continued union activity. The Board adopted these findings and conclusions.

Our task is solely to determine whether these findings are supported by substantial evidence from the record as a whole. *N.L.R.B. v. Universal Camera Corp.,* 340 U.S. 474, 48 (1951). While this Court might reach a different conclusion based on the same evidence, we may not overturn the Board's determination if it is supported by substantial evidence. *N.L.R.B. v. Ayer Lar Sanitarium,* 436 F.2d 45, 48 (9th Cir. 1970).

In *Western Exterminator v. NLRB,* 565 F.2d 1114 (9th Cir. 1977), this Court held that a discriminatory motive must be the dominant or moving cause of a discharge. As the Court has recognized, this can be a more demanding standard of proof than the previously adhered to "but for" test. *Poylnesian Cultural Center, Inc. v. NLRB,* 582 F.2d 467, 473 (9th Cir. 1978). While A.L.J. Myatt did not employ adjectives such as "dominant" or "moving", he specifically concluded that Cutchins, Rees and Pratchenko were discharged because of their Union activity. Our review of the facts leading up to the dismissal of these instructors leads us to the conclusion that a discriminatory purpose was the moving cause of their termination. Moreover, there is substantial evidence in the record to support that conclusion,

irrespective of our agreement with the A.L.J. The Board's findings of violations of Sections 8(a)(1) and (3) will not be set aside.

Finally, the parties have submitted numerous letters and memoranda on the applicability in this case of the Supreme Court's recent decision in *NLRB v. Yeshiva University* (No 78-857, February 28, 1980). In that case the Court held that the faculty of a "mature" private university are more than simply professional employees. Because of their significant role in formulating and implementing university policy, they are "managerial employees" and thus excluded from the coverage of the Act. Slip opinion, p. 8-9. *See also NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

The Academy contends that the instructors in question are managerial employees within the meaning of *Yeshiva* and are therefore excluded from the protection of the Act. The Board argues that because the "managerial employee" exception was not raised before the Board, the Academy is barred from raising that objection under Section 10(e) of the Act, 29 U.S.C. § 160(e). Section 10(e) provides that unless "failure or neglect to urge such objection [before the Board] shall be excused because of extraordinary circumstances," the objection shall not be heard by the Court of Appeals. *See e.g. NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961).

Generally, we would be inclined to view a controlling pronouncement from the Supreme Court as an extraordinary circumstance and would excuse the failure to raise the issue below.[2] However, *Yeshiva* is not such a case. In *Yeshiva* the Court applied the managerial employee exception to a "mature" university. The Court relied heavily on

---

2. Furthermore, judicial economy dictates that we explore the effect of *Yeshiva* on this case.

the policy making role of the faculty at such an institution. The instructors at the Academy hardly share such a role. They have no input into policy decisions, and do not engage in management level decision making. They are simply employees. Also, the Academy bears little resemblance to the non-profit "mature" university discussed in *Yeshiva*. In summary, we find that *Yeshiva* is inapplicable to this case, and therefore not the "extraordinary development" which might otherwise excuse appellant's failure to raise the managerial employee exception before the Board.

The Board has adopted the Orders of Administrative Law Judges Stevens and Myatt calling for reinstatement with back pay, and that the Academy cease engaging in unfair labor practices. For the reasons set forth herein, ENFORCEMENT is GRANTED.

Appendix 4

Received—Richard H. Deane
Clerk, U.S. Court of Appeals
May 27 1980
Filed 6-24-80
Docketed 5-27-80 DN.

United States Court of Appeals
For the Ninth Circuit

No. 79-7132

STEPHENS INSTITUTE, a Corporation
d/b/a ACADEMY OF ART COLLEGE,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: KILKENNY and SCHROEDER, Circuit Judges and CAMPBELL, Senior District Judge*

THIS CAUSE came on to be heard upon a petition filed by Stephens Institute, a corporation d/b/a Academy of Art College, San Francisco, California, its officers, agents, successors, and assigns on March 29, 1979, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on February 14 1980, and has considered the briefs

*Honorable William J. Campbell, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

and transcript of record filed in this cause. On May 5, 1980, the Court being fully advised in the premises, issued an opinion enforcing the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the Court that

Petitioner, Stephens Institute, d/b/a Academy of Art College, San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act, in violation of Section 8(a)(1) of said Act by: interrogating its employees concerning their protected activities; threatening its employees with termination if they refused to sign individual employment contracts; threatening its employees with physical injury if those employees engage in future protected activity; threatening to lock out employees who supported California Federation of Art Teachers Local No. 1 (hereinafter called the Union); offering to employees more work at a higher salary if the employees would abandon their protected activity; soliciting employees to engage in surveillance of union meetings; and threatening to close the school rather than deal with the Union.

(b) Violating Section 8(a)(2) and (1) of the Act by: dominating, assisting and contributing to the support of, and interfering with, the Academy of Art College Faculty Senate; giving effect to the Commitment made and distributed by Petitioner to students and employees of Petitioner on June 8, 1977; and recognizing the Academy of Art College Faculty Senate, or any successor thereto, as the representative of its employees concerning wages, rates of pay, hours of employment, and other terms and conditions of

employment. Provided, however, that nothing in this Judgment shall require or authorize Petitioner to vary or abandon any wage, hour, seniority, or other substantive benefit it has established for its employees because of the aforesaid agreement, or to prejudice the assertion by its employees of any rights they derived as a result of said agreement; and further provided, that nothing herein shall be construed as prohibiting its employees from forming, joining or assisting any labor organization.

(c) Violating Section 8(a)(3) and (1) of the Act by:

(1) Discharging employees Joseph Doyle on December 27, 1976, Joseph Rees on January 18, 1977, and Paul Pratchenko on January 20, 1977, because of their protected activities;

(2) Discharging the employees named in conclusion No. 6(b) of the Administrative Law Judge's Decision, on January 24, because of their participating in an unfair labor practice strike, and failing to reinstate said employees after the employees made an unconditional offer on February 16 to return to work; and

(3) Denying employment to the employees named in conclusion No. 6(c), of the Administrative Law Judge's Decision from and after September 1, 1977, because said employees engaged in protected activity.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose or coercing employees in the exercise of their rights to self- or to refrain from any and all such activities.

2. Take the following affirmative action, which has been found will effectuate the policies of the Act:

(a) Withdraw and withhold recognition from, and completely disestablish, the Academy of Art College Faculty Senate, or any successor thereto, as the representative of its employees for the purpose of collective bargaining, including the settlement of grievances.

(b) Offer Joseph Doyle, Joseph Rees and Paul Pratchenko immediate and full reinstatement to their former jobs or, if those jobs no longer exist to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings in the manner set forth in the "Remedy" section of the Administrative Law Judge's Decision. (attached hereto as Appendix A)

(c) Offer to each and all strikers, named in conclusion No. 6(b) of the Administrative Law Judge's Decision immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, replacement employees, and make said strikers whole for any loss of earnings suffered by reason of the discrimination against them, with backpay to commence on January 24, with interest thereon to be computed as described in the "Remedy" section of the Administrative Law Judge's Decision.

(d) Offer to each and all employees named above in conclusion No. 6(c) of the Administrative Law Judge's Decision teaching positions, effective from on or about September 1, 1977, to which said employees ordinarily would have been assigned but for Petitioner's discrimination against them, dismissing, if necessary, replacement employees, and make said named employees whole for any loss of earnings suffered by reason of Petitioner's discrimination against them, with interest thereon to be com-

puted in the manner set forth in the "Remedy" section of the Administrative Law Judge's Decision.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(f) Post at its San Francisco, California place of business copies of the attached notice marked "Appendix B." Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by a representative of Petitioner, shall be posted by Petitioner immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced or covered by any other material.

(g) Notify the aforesaid Regional Director for Region 20, in writing, within 20 days from the date of this Judgment, what steps Petitioner has taken to comply herewith. Endorsed, Judgment filed and Entered

So Ordered:

Judges:

/s/ Richard H. Deane
Richard H. Deane
Clerk

John F. Kilkenny,
John F. Kilkenny, CJ

A True Copy

Attest

Richard H. Deane
Clerk

Mary M. Schroeder,
Mary M. Schroeder, CJ

William J. Campbell
William J. Campbell, DJ

Costs in this court in favor of the respondent and intervenor and against the petitioner

Costs:	
Briefs for the Intervenor	$185.91
Records Reproduction	68.00
	$253.91
28 copies of the respondent's opening brief	$247.28
TOTAL	$501.19

A True Copy
Attest

3—Jul 1980

Richard H. Deane
Clerk of Court

by: Oscar Tagle
Deputy Clerk

APPENDIX A

The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Sections 8(a)(1), (2) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent unlawfully discharged its employees Doyle, Rees and Pratchenko. I will, therefore, recommend that Respondent offer Doyle, Rees and Pratchenko their former jobs or, if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings suffered by reason of the discrimination against them, by payment to them of sums of money equal to that which they normally would have earned, absent the discrimination, less net earnings during such period, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Florida Steel Corporation,* 231 NLRB No. 117 (1977).[55]

It has been found that, on January 28, 1977, Respondent unlawfully discharged all employees named hereinbelow, who engaged in an unfair labor practice strike from January 20, 1977 until February 16, 1977. I will recommend that Respondent offer to each and all strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, replacement teachers, and make said strikers whole for any loss of earnings suffered

55. See generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

by reason of the discrimination against them, with backpay to commence on February 17, with interest thereon to be computed as described above.

It has been found that, from on or about September 1, 1977, Respondent denied employment to its employees named hereinbelow. I will recommend that those employees be offered teaching positions to which they ordinarily would have been assigned, but for the discrimination against them, commencing with the start of the fall term of Respondent in 1977, dismissing, if necessary, replacement employees, and make said named employees whole for any loss of earnings suffered by reason of the discrimination against them, with interest thereon to be computed as set forth above.[56]

---

56. Respondent has paid to some discriminatees, pursuant to the settlement agreement described above, certain sums of money as backpay. All such sums can be ascertained in compliance proceedings, and deducted from any sums found due and owing pursuant to this decision.

APPENDIX B

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF

National Labor Relations Board

An Agency of the United States Government

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act, in violation of Section 8(a)(1) of said Act by: interrogating our employees concerning their protected activities; threatening our employees with termination if they refused to sign individual employment contracts; threatening our employees with physical injury if they engage in future protected activity; threatening to lock out employees who support the California Federation of Art Teachers, Local No. One (Union); offering to employees more work at a higher salary if they will abandon their protected activity; soliciting employees to engage in surveillance of union meetings; or threatening to close our school rather than deal with the Union.

WE WILL NOT dominate, assist, contribute to the support of, or interfere with the Academy of Art College Faculty Senate (Faculty Senate), or give effect to the commitment made and distributed by us to our students and employees on June 8, 1977.

WE WILL NOT recognize the Faculty Senate, or any successor thereto, as the representative of our employees concerning wages, rates of pay, hours of employment, and other terms and conditions of employment.

WE WILL NOT vary or abandon any wage, hour, seniority, or other substantive benefit established for our employees

because of the aforesaid agreement, or prejudice the assertion by our employees of any right they have derived as a result of said agreement.

WE WILL NOT discharge our employees because of their union or other protected activities.

WE WILL NOT discharge our employees because of their participation in unfair labor practice strikes against us, or fail to reinstate them after they have made unconditional offers to return to work.

WE WILL NOT deny employment to our employees because they have engaged in union or other protected activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL withdraw and withhold recognition from, and completely disestablish, the Faculty Senate, or any successor thereto, as the representative of our employees for the purpose of collective bargaining, including the settlement of grievances.

WE WILL offer Joseph Doyle, Joseph Rees, and Paul Pratchenko immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings with interest.

WE WILL offer to each and all of the following named strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, replacement employees, and make said strikers whole for any loss of earnings suffered by reason of our discrimination against

them, with liability to commence on January 24, 1977, with interest thereon: Leslie Becker, Karl Cohen, William Cutchins, Dennis Gray, Tom Keller, Anna Rosich, Elizabeth Sher, Mort Kohn, Jan Oswald, Ernest Posey, Julie Roman, Dave Sanchez, Louise Stanley, Jack Stone, Marion Swetsc nski, Dick Warton, Tom Wojak, Beverly Wolfe, Joseph Doyle, Joseph Rees, Paul Pratchenko, and Kenneth Light.

WE WILL offer to each and all of the following named employees, effective from on or about September 1, 1977, teaching positions to which said employees ordinarily would have been assigned but for our discrimination against them, dismissing, if necessary, replacement employees, and make said named employees whole for any loss of earnings suffered by reason of our discrimination against them, with interest thereon: Joseph Doyle, Elizabeth Sher, Dave Sanchez, Mort Kohn, Kenneth Light, Ernest Posey, Julie Roman, Paul Pratchenko, Louise Stanley, Jack Stone, Tom Wojak, Marion Swetschinski, Karl Cohen, William Cutchins, and Joseph Rees.

STEPHENS INSTITUTE, d/b/a
ACADEMY OF ART COLLEGE
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 13018, Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone 415—556-0335.

Appendix 5

United States Court of Appeals
Ninth Circuit

Nos. 79-7132/7215

STEPHENS INSTITUTE, a corporation,
d/b/a Academy of Art College,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

CALIFORNIA FEDERATION OF ART
TEACHERS, LOCAL NO. ONE,
Intervenor.

ORDER

On Petition for Review and Cross-Applications
for Enforcement of an Order of the National
Labor Relations Board

Before: KILKENNY and SCHROEDER, Circuit Judges, and CAMPBELL, District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

FILED JUN 25 1980
RICHARD H. BEANE
Clerk, US Court of Appeals

---

*The Honorable William J. Campbell, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

80-307

No. .....

Supreme Court, U. S.
FILED
AUG 28 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER 1980 TERM

STEPHENS INSTITUTE, a corporation, d/b/a ACADEMY OF ART COLLEGE,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CALIFORNIA FEDERATION OF ART TEACHERS,
Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Supplement to Appendix to Petition

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RECEIVED
RICHARD H. DEANE
Clerk, U.S. Court of Appeals
MAY 27 1980
Filed 6-24-80
Docketed 5-27-80

United States Court of Appeals
for the Ninth Circuit

No. 79-7215

STEPHENS INSTITUTE, a Corporation
d/b/a ACADEMY OF ART COLLEGE,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: KILKENNY and SCHROEDER, Circuit Judges and CAMPBELL, Senior District Judge*

THIS CAUSE came on to be heard upon a petition filed by Stephens Institute, a corporation d/b/a Academy of Art College, San Francisco, California, its officers, agents, successors, and assigns on May 8, 1979, and upon a cross-application filed by the National Labor Relations Board to

*Honorable William J. Campbell, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

enforce said order. The Court heard argument of respective counsel on February 14, 1980, and has considered the briefs and transcript of record filed in this cause. On May 5, 1980, the Court being fuly advised in the premises, issued an opinion enforcing the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the Court that Petitioner, Stephens Institute, d/b/a Academy of Art College, San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Terminating employees for the reason that they engage in protected activities on behalf of California Federation of Art Teachers, Local No. One, (hereinafter called the Union) or any other labor organization, or because they are members of the above-mentioned union, or any other labor organization.

(b) Cancelling classes of instructors and refusing to offer them a future teaching assignment because they are members of the above-named union or any other labor organization.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the N.L.R.A. (hereinafter called the Act) as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer [William] Liam Cutchins, Joseph Rees, and Paul Pratchenko immediate reinstatement to the positions they held as instructors on the Petitioners faculty, discharging if necessary any instructors hired to teach their course

subjects as of the beginning of the 1978 spring semester and thereafter, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole, in the manner set forth in the section of the A.L.J.D. entitled the "Remedy," (attached hereto as Appendix A) for any loss of earnings they may have suffered by reason of the unlawful discrimination against them.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary and relevant to analyze and compute the amount of the back-pay and reinstatement rights due under this recommended Judgment.

(c) Post at its San Francisco, California, facility, copies of the attached notice marked "Appendix B." Copies of said notice on forms provided by the Regional Director for Region 20, after being duly signed by the Petitioners authorized representative, shall be conspicuously posted by it immediately upon receipt thereof, and maintained for 60 consecutive days thereafter, in places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director for Region 20, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:
JUDGES:

/s/ Richard H. Deane
Richard H. Deane
Clerk

A TRUE COPY,

ATTEST:
Richard H. Deane
Clerk

JOHN F. KILKEENY, CJ
MARY M. SCHROEDER, CJ
WILLIAM J. CAMPBELL, DJ

A TRUE COPY
ATTEST 3 Jul 1980
Richard H. Deane
Clerk of Court
by: OSCAR FAGLE
Deputy Clerk

APPENDIX A

The Remedy

Having found that the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, the Respondent shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In view of the finding that the Respondent unlawfully terminated the employment of [William] Liam Cutchins and cancelled the classes of Joseph Rees and Paul Pratchenko for the reason that they engaged in protected concerted activity and in order to discourage membership in and activities on behalf of the Union, the Respondent shall be ordered to offer them full and immediate reinstatement to their former positions of employment, discharging if necessary any instructors hired to teach their course subjects since the beginning of the 1978 spring semester, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them. Backpay shall be computed with interest thereon, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[31]

Since the unfair labor practices commited here are of a character striking at the very heart of employee rights guaranteed by the Act, it will also be recommended that the Respondent be required to cease and desist from interfering in any manner with the rights of employees as guaranteed

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[31]See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

by Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (5th Cir. 1941); *N.L.R.B.* v. *The Bama Co.*, 353 F. 2d 320, 323-324 (5th Cir. 1965); *P. R. Mallory and Co., Inc.* v. *N.L.R.B.*, 400 F.2d 956, 959-960 (7th Cir. 1968), cert. denied 394 U.S. 918.

APPENDIX B

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

THE NATIONAL LABOR RELATIONS BOARD HAVING FOUND, AFTER A HEARING IN WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, THAT WE COMMITTED CERTAIN UNFAIR LABOR PRACTICES IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, WE HEREBY NOTIFY YOU THAT:

WE WILL NOT terminate employees because they engage in activities protected by Section 7 of the National Labor Relations Act, as amended, and/or because they are members of CALIFORNIA FEDERATION OF ART TEACHERS, LOCAL NO. ONE, or any other labor organization.

WE WILL NOT cancel classes of our instructors and refuse to offer them future teaching assignments because they are members of the above-named union, or any other labor organization, and have engaged in union and/or protected concerted activities on behalf of the above-named union, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Nationl Labor Relations Act, as amended.

WE WILL offer [William] Liam Cutchins, Joseph Rees, and Paul Pratchenko immediate and full rein-

statement to their former positions of employment, discharging if necessary any instructors hired to teach their course subjects since the beginning of the 1978 spring semester and thereafter, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them.

STEPHENS INSTITUTE, d/b/a
ACADEMY OF ART
COLLEGE
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice of compliance with its provisions may be directed to the Board's Office.

No. 80-307

Supreme Court, U. S.
FILED
OCT 3 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

STEPHENS INSTITUTE, A CORPORATION d/b/a ACADEMY OF ART COLLEGE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
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WILLIAM A. LUBBERS
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Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-307

STEPHENS INSTITUTE, A CORPORATION d/b/a ACADEMY OF ART COLLEGE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Board properly relied on a stipulation of fact in asserting jurisdiction over petitioner.

2. Whether the court of appeals properly declined to remand the case to the Board for reconsideration in light of *NLRB* v. *Yeshiva University*, No. 78-857 (Feb. 20, 1980).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 123-136) is reported at 620 F. 2d 720. The decisions and orders of the National Labor Relations Board (Pet. App. 1-78, 79-122) are reported at 241 N.L.R.B. No. 71 and 241 N.L.R.B. No. 133.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1980 (Pet. App. 137-147). The petition for a writ of certiorari was filed on August 28, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and the Code of Federal Regulations are set forth at Pet. 2-5.

STATEMENT

1. In two separate unfair labor practice proceedings, the Board found that petitioner, in response to union[1] organizing activity, violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging three employees because of their union activities, by discharging and failing to reinstate unfair labor practice strikers, and by denying reemployment to employees because of their union activities. The Board also found that petitioner violated Section 8(a)(1) of the Act by threatening and interrogating its employees, by soliciting employees to engage in surveillance of a union meeting, and by offering employees more work at a higher salary if the employees agreed to abandon their protected activity. The Board further found that petitioner violated Section 8(a)(2) and

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[1]California Federation of Art Teachers, Local No. 1.

(1) of the Act by creating, dominating, assisting and contributing to the support of the Academy of Art College Faculty Senate, and by recognizing the Faculty Senate as the representative of its employees in negotiations concerning wages, hours, and other terms and conditions of employment (Pet. App. 70-71, 116).

2. The court of appeals upheld the Board's factual findings (Pet. App. 124) and petitioner does not dispute them here. Its sole contentions are that the Board improperly asserted jurisdiction over it and that the court of appeals erred in refusing to remand the case for reconsideration in light of *NLRB* v. *Yeshiva University*, No. 78-857 (Feb. 20, 1980). The facts relevant to these issues are set forth below.

Petitioner is a corporation that owns and operates a private art school. The art school has approximately 1,000 full and part-time students and employs approximately 58 instructors (Pet. App. 15-16). Richard A. Stephens is petitioner's president, principal stockholder and principal administrative officer. With the assistance of his three-member administrative staff, he makes all important policy decisions, including the hiring and firing of instructors (*ibid.*). Most of the school's departments have chairpersons who serve to some extent as intermediaries between the staff and the other instructors (Pet. App. 17). The instructors are paid on the basis of the number of classes per week that they teach (Pet. App. 124).

Based on charges filed by the Union, the Board issued a complaint alleging that petitioner had violated the Act. At the commencement of the unfair labor practice hearing, petitioner and the Board's Regional Director entered into an informal partial settlement agreement, wherein petitioner agreed to reinstate 16 strikers and stipulated, *inter alia*, to certain facts that brought the art school within the

Board's jurisdiction (Pet. App. 4-6, 13-14).[2] The settlement agreement was received in evidence at the hearing (Pet. App. 5; GCX 3; Tr. 5-6, 9).[3] The hearing thereafter focussed on the remaining issues, which concerned the reinstatement of 6 employees that petitioner asserted were supervisors.[4]

Following the completion of the hearing, petitioner violated the settlement agreement with the Regional Director by, *inter alia*, failing to fully reinstate a number of the strikers. This violation of the settlement agreement caused the Regional Director to set it aside and move to reopen the hearing (Pet. App. 4-6, 63-67). At no time after the hearing resumed did petitioner present evidence

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[2]Under Section 103.1 of the Board's Rules and Regulations (29 C.F.R. 103.1), the Board asserts jurisdiction over private nonprofit colleges and universities that have gross annual revenues of not less than $1 million.

[3]"GCX" refers to the General Counsel's exhibits at the hearing. "Tr." refers to the transcript therein.

[4]The Board found that the 6 employees were not supervisors. Petitioner's claim of supervisory status was based on the allegation that the 6 employees (Doyle, Rees, Pratchenko, Warton, Keller and Sher) were department chairpersons. However, the administrative law judge found that after the inception of the organizing campaign, Doyle, Warton and Keller were formally relieved of their position as chairpersons (Pet. App. 41, 54-56). In addition, Pratchenko "was not treated as, nor given the responsibility of, more than a rank-and-file instructor * * *. He did not participate in any administrative function; he had no counseling duties; his maintenance duties already had been taken over by Warton; and he made no recommendations concerning teacher assignments, new hires, discharges or schedules" (Pet. App. 43). The Board further found that "[i]t was not shown that Rees ever exercised independent judgment in any supervisorial function," and that he was not treated by management as a supervisor (Pet. App. 46). Sher was designated chairperson of the printmaking department. However, that department, which was part of the fine arts department, contained no more than four instructors, including Sher, and her designation as chairperson was informal. Indeed, she "never was told that she had supervisory authority; that she never hired, fired, effectively recommended, directed or otherwise

contradicting its admissions in the settlement stipulation of the facts that established the Board's jurisdiction (Pet. App. 6).

The Board rejected petitioner's post-hearing assertion that the Board was not entitled to rely on petitioner's admissions of jurisdictional facts simply because the Regional Director had withdrawn approval of the settlement agreement. The Board observed that the stipulations between petitioner and the Regional Director and between petitioner and the Union (Pet. App. 6):

> once entered into evidence, constituted a judicial admission on [petitioner's] part as to the facts contained therein. Such an admission has the effect of a confessory pleading and its principal characteristic is that it is conclusive upon the party making it. E.g., *The Kroger Co., Houston Division*, 211 N.L.R.B. 363, 364 (1974); see, generally, 9 Wigmore, *A Treatise on Evidence in Trials at Common Law*, §§2588, 2590 (3d ed. 1940).

Moreover, the Board emphasized that "[a]t no time during the proceeding did [any party] seek to withdraw from [the stipulations] or introduce evidence contrary thereto" (*ibid.*).

In the second unfair labor practice proceeding involving petitioner, the Board rejected petitioner's attempt to rescind the stipulation as to jurisdiction (Pet. App. 86-87). In addition, the Board found that the evidence of record in the second proceeding established that petitioner's gross revenues MET THE Board's jurisdictional standard (Pet. App. 87-89).

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supervised other employees; and * * * she did not consider herself as a supervisor" (Pet. App. 57-58).

4. The court of appeals rejected petitioner's contention that, because the Board set aside the settlement, it was also required to set aside the stipulation as to jurisdiction (Pet. App. 132). The court explained that (Pet. App. 133; footnote omitted):

> The reopening of charges before the Administrative Law Judge did not, and could not, affect those facts which were already in evidence in the case. Whether those facts were adduced by stipulation, testimony or documentary evidence, they are part of the record in the case. The reopening of the proceeding, in accordance with the terms of the settlement agreement, does not nullify the stipulation to jurisdiction. In addition, the Academy's defense at the hearing did not call into question the existing stipulation. At no point did the Academy seek to withdraw from the stipulation. Rather, appellant simply argued that it had cancelled the classes pursuant to the minimum enrollment provisions of the settlement agreement. We cannot accept the Academy's assertion that either equity or general principles of contract law require this Court to set aside a stipulation which was freely entered into, never withdrawn, and is part of the record in the case.

With respect to the second unfair labor practice proceeding, the court also noted that ample independent evidence as to gross receipts was presented, thus negating any claim of lack of jurisdiction (Pet. App. 133).

Finally, the court of appeals rejected petitioner's contention that the instructors at the art school were exempt from coverage under the Act under the authority of *NLRB* v. *Yeshiva University*, No. 78-857 (Feb. 20,

1980), which was decided after the Board's decision herein. The court explained (Pet. App. 135-136):

> In *Yeshiva* the Court applied the managerial employee exception to a "mature" university. The Court relied heavily on the policy making role of the faculty at such an institution. The instructors at the Academy hardly share such a role. They have no input into policy decisions, and do not engage in management level decision making. They are simply employees. Also, the Academy bears little resemblance to the non-profit "mature" university discussed in *Yeshiva*.

ARGUMENT

1. The court of appeals' ruling that petitioner's stipulation of jurisdiction remained a part of the record after the settlement was rescinded is correct, conflicts with no other decision, and raises no issue warranting review by this Court.[5] For the reasons stated by the court of appeals (Pet. App. 132-133), petitioner's formal judicial admission remained part of the record in this case. That admission was not removed from the record simply

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[5]The cases relied on by petitioner (Pet. 9-12) are completely inapposite. *Gulf States Manufacturers, Inc.* v. *NLRB*, 598 F. 2d 896, 903-904 (5th Cir. 1979), did not involve any question concerning judicial admissions. That case simply held that, when a Regional Director approves a settlement that includes withdrawal of unfair labor practice charges, those charges cannot later be revived when the charged party subsequently commits unrelated unfair labor practices. *A & A Sign Co.* v. *Maughan*, 419 F. 2d 1152, 1155 (9th Cir. 1969), and *Emerick & Duncan Co.* v. *Hascy*, 146 F. 688, 695 (9th Cir. 1906), dealt with stipulations concerning remedies, not admissions of underlying jurisdictional facts. *Stoffela* v. *Nugent*, 217 U.S. 499 (1910), is also irrelevant here. That case simply holds that a mortgagee does not forfeit moneys owed him under a mortgage because of a fraudulent attempt on his part to obtain ownership of the mortgaged property.

because petitioner breached its settlement agreement and thereby compelled the Board to resume the proceeding. Moreover, even assuming that petitioner had the right to contradict its judicial admission, it wholly failed to do so. Petitioner offered no evidence contrary to its prior admission, and thus offered no factual basis for questioning its accuracy.[6]

2. There is no merit to petitioner's assertion (Pet. 12-15) that this Court's decision in *Yeshiva* requires a remand to the Board. In *Yeshiva*, this Court held that at a "mature" university where the faculty " 'in effect, substantially and pervasively operat[es] the enterprise,' " the full-time faculty members are managerial employees beyond the Act's coverage. Slip op. 18. At the same time, however, the Court cautioned against generalities about the status of faculty (*id.* at 17-18, n.31):

> It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in the bargaining unit.

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[6]Petitioner's assertion (Pet. 11) that the General Counsel did not attempt to prove jurisdiction after the settlement was rescinded because the facts would not meet of the Board's discretionary jurisdictional standards is not borne out by the record. The jurisdictional facts established at the hearing in the second unfair labor practice case—facts that are not challenged before this Court—covered the year 1977, when the unfair labor practices in the first case occurred. Thus, direct evidence in addition to the August 1977 admission shows that the Board's jurisdictional standards were met at the time the first case was litigated. Cf. *NLRB* v. *Timberland Packing Corp.*, 550 F. 2d 500, 501 (9th Cir. 1977), cert. denied, 434 U.S. 922.

Here, in contrast to *Yeshiva*, the faculty played no role of any significance other than teaching. Petitioner's contention that the instructors were managerial because they elected members of the Faculty Senate ignores the fact that the Faculty Senate never existed prior to January 24, 1977 (Pet. App. 59), and was created solely "to provide [petitioner] with a way to regulate working conditions through an in-house arrangement rather than through negotiations with an independent union" (Pet. App. 60). Moreover, since petitioner alone created and had power to abolish the Senate, the Board found that petitioner's domination, assistance and support of the Senate violated Section 8(a)(2) and (1) of the Act. In effect, petitioner seeks to plead its own unfair labor practice—creating the Senate as a means of dissipating support for the Union—as proof that its instructors were pervasively in charge of the university. These facts, however, are only further illustrations of the separation between instructors and management at Stephens Institute and the absence of faculty control over the educational enterprise. As the court of appeals emphasized (Pet. App. 136): "[The instructors] have no input into policy decision, and do not engage in management level decisionmaking. They are simply employees."

Petitioner's further assertion (Pet. 14) that, whatever the status of its instructors generally, its chairpersons participated in management of the school and therefore are managerial employees, is also wide of the mark. As the Board expressly found, none of the discriminatees involved in this case functioned as chairpersons at the time of their discharge (see page 3 note 4, *supra*).[7]

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[7]The instant case differs significantly from *Trustees of Boston University* v. *NLRB*, No. 78-67 (Mar. 3, 1980), vacating and remanding the decision of the court of appeals (575 F. 2d 301 (1st

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Cir. 1978)) for further consideration in light of *Yeshiva*. In *Boston University*, the court of appeals concluded that department chairpersons were employees under the Act because, to the extent they participated in supervisory or managerial matters, their "recommendations were not 'effective' or [they were] acting 'in the interest' of the faculty, not of the employer." 575 F. 2d at 306. Here, by contrast, no chairpersons who participated in any arguably supervisory or managerial matters were involved in the case. Moreover, while Boston University is arguably a university similar to Yeshiva, the court of appeals correctly concluded here that petitioner "bears little resemblance to the non-profit 'mature' university discussed in *Yeshiva*" (Pet. App. 136).

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